(19)

No. 03-9877
Title: Jon B. Cutter, et al., Petitioners
v.
Reginald Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al.
Docketed: April 19, 2004
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (02-3270, 02-3299, 02-3301)
Decision Date: November 7, 2003
Rehearing Denied: March 3, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 19 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 19, 2004)
May 5 2004	Order extending time to file response to petition to and including June 18, 2004.
Jun 15 2004	Order further extending time to file response to petition to and including July 19, 2004, for all respondents.
Jul 19 2004	Brief of respondent United States filed.
Jul 19 2004	Brief of respondents Reginald Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. in opposition filed.
Aug 4 2004	DISTRIBUTED for Conference of September 27, 2004.
Oct 4 2004	DISTRIBUTED for Conference of October 8, 2004.
Oct 12 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 4 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including December 6, 2004.
Nov 15 2004	Further extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including December 20, 2004.
Dec 9 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Dec 17 2004	Brief amicus curiae of Rutherford Institute filed.
Dec 20 2004	Brief amicus curiae of Coalition for the Free Exercise of Religion filed.
Dec 20 2004	Brief amici curiae of Americans United for Separation of Church and State, et al. filed.
Dec 20 2004	Brief amici curiae of National Association of Evangelicals and Union of Orthodox Jewish Congregations of America filed.
Dec 20 2004	Brief amici curiae of New York and Washington filed.
Dec 20 2004	Brief amici curiae of Orrin G. Hatch and Edward M. Kennedy filed.
Dec 20 2004	Brief amicus curiae of American Correctional Chaplains Association, et al. filed.
Dec 20 2004	Joint appendix filed.
Dec 20 2004	Brief of petitioners Jon B. Cutter, et al. filed.
Dec 20 2004	Brief of respondent United States in support filed.
Jan 10 2005	Extension of time within which to file respondents' brief on the merits to and including February 11, 2005.
Jan 19 2005	SET FOR ARGUMENT ON Monday, March 21, 2005.
Feb 2 2005	Motion for divided argument filed by respondent United States.

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Feb 4 2005	CIRCULATED.
Feb 11 2005	Brief amici curiae of International Municipal Lawyers, et al. filed. (Distributed)
Feb 11 2005	Brief amici curiae of Virginia, et al. filed. (Distributed)
Feb 11 2005	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. (Distributed)
Feb 11 2005	Brief of respondents Reginald Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed. (Distributed)
Feb 11 2005	Brief amici curiae of American Jail Association, et al. filed. (Distributed)
Feb 14 2005	Record received from U.S.C.A. 6th Circuit. (1 binder)
Feb 17 2005	Record received from U.S.D.C. Southern District of Ohio. (1 box)
Feb 28 2005	Motion for divided argument filed by the Acting Solicitor General GRANTED.
Mar 10 2005	Reply of petitioners Jon B. Cutter, et al. filed. (Distributed)
Mar 14 2005	Reply of respondent United States supporting the petitioners filed. (Distributed)
Mar 21 2005	Argued. For respondent United States, supporting petitioners: Paul D. Clement, Acting Solicitor General, Department of Justice, Washington, D.C. For petitioners: David Goldberger, Columbus, Ohio. For respondent Wilkinson: Douglas R. Cole, State Solicitor, Columbus, Ohio.

(20)

No. ____

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SUPREME COURT U.S.
POLICE DEPARTMENT

03-8871

In The
Supreme Court of the United States

JON B. CUTTER; J. LEE HAMPTON,
Petitioners,

v.

REGINALD WILKINSON, et al.,
Respondents.

Supreme Court, U.S.
FILED
APR 19 2004
OFFICE OF THE CLERK

JOHN MILLER; DARRYL BLANKENSHIP,
Petitioners,

v.

REGINALD WILKINSON, et al.,
Respondents.

JOHN W. GERHARDT,
Petitioner,

v.

ALAN LAZAROFF, WARDEN, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioners ask leave to file their Petition for a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioners have previously been granted leave to proceed *in forma pauperis* in the United States District Court for the Southern District of Ohio. In addition, the counsel who represent them in this Court have been appointed in the District Court pursuant to 28 U.S. 1915(e)(1).

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No. 03-9877

In The
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On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether Congress violated the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 through § 2000cc-5, which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control.

PARTIES TO THE CONSOLIDATED PROCEEDINGS

The Petitioners are inmates of the Ohio Department of Rehabilitation and Correction. They are Jon Cutter, Lee Hampton, John W. Gerhardt, John Miller, and Darryl Blankenship. John Miller and Darryl Blankenship bring this action individually and on behalf of all other members of the Asatru Religion who are similarly situated.

The Respondents are Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Correction, Alan Lazroff, Warden of the Ohio Department of Rehabilitation and Correction and other named officials of the Ohio Department of Rehabilitation and Correction.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner inmates, who have brought suit against officials of the Ohio Department of Rehabilitation and Correction, respectfully request that this Court grant their Petition for Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals holding that the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-1, violates the Establishment Clause of the First Amendment.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rehearing denied and rehearing en banc denied*, (March 3, 2004). It is reproduced in the Appendix at App. A. The opinion of the District Court and the report and recommendation of the Magistrate Judge are combined in *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827 (S.D.Ohio 2002), which is reproduced in the Appendix at App. B.

JURISDICTION

On February 26, 2002, the District Court denied Respondents' partial motion to dismiss, ruling that the Religious Land Use and Institutionalized Persons Act was constitutional on its face. On August 4, 2003, the District Court certified its ruling for immediate appeal. The Court of Appeals granted leave to appeal on September 23, 2003. The Court of Appeals entered its judgment holding that RLUIPA violates the Establishment Clause on November 7, 2003. A petition for rehearing and rehearing en

banc was denied on March 3, 2004. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE IN THIS CASE

1. The Establishment Clause of the First Amendment provides that: "Congress shall make no law respecting an establishment of religion. . . ."

2. The provisions of the Religious Land Use and Institutionalized Persons Act that are relevant to this petition are in 42 U.S.C. § 2000cc-1:

> (a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution as defined in section 2 of the Civil Rights of Institutionalized Persons Act, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application. This section applies in any case in which –
>
> > (1) the substantial burden is imposed in a program or activity that receives federal financial assistance; or
> > (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian Tribes.

STATEMENT OF THE CASE

Petitioners seek review of the ruling of the Sixth Circuit Court of Appeals invalidating the provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. The specific language of § 2000cc-1 that the Sixth Circuit declared unconstitutional provides that "[n]o government shall impose a substantial burden on

the religious exercise of a person residing in or confined to an institution" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that" interest.[1]

Petitioners seek review of the Sixth Circuit's ruling because it is in conflict with the rulings of three other circuits that have held RLUIPA does not violate the Establishment Clause. See *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) cert. petition pending *sub nom. Bass v. Madison*, No. 03-1404 (filed April 6, 2004); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); and *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), *cert. denied* 124 S.Ct. 66 (2003). It is also in conflict with the authority of Congress and other legislative bodies to accommodate religion by lifting needless burdens on religious exercise imposed by state and federal officials. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

The petition arises out of three separate cases brought by inmates of the Ohio Department of Rehabilitation and Corrections (ODRC) alleging that ODRC officials are imposing burdens on their religious exercise that would violate RLUIPA and would not be imposed if Petitioners were members of mainstream religions. Petitioner Lee Hampton is a member of the Wicca religion which "is polytheistic, finding its pantheon in various European pre-Christian nature religions."[2] Petitioners John Miller and Daryl Blankenship are representatives of the class comprised of inmate members of the Asatru

[1]RLUIPA also contains provisions governing burdens imposed on religious exercise by land use regulations. Those provisions are not at issue in this case.

[2]See Encyclopedia of American Religions, 6th edition, Michigan, 1999, p. 167.

religion, a polytheistic religion that espouses the existence of an "underlying, all-pervading divine energy which is generally hidden from us and which is beyond our immediate understanding."[3] Petitioner Jon Cutter, a former ODRC inmate, is a member of the Satanist religion which formed as a protest against Judeo-Christian spiritual hegemony..[4] John Gerhardt, a former ODRC inmate, is an ordained, licensed Ohio minister in the Church of Jesus Christ Christian, also known as the Christian Identity Church.[5] The Respondents are ODRC officials. In the District Court, Respondents conceded that the Petitioners' religions are *bona fide* and that Petitioners genuinely hold their religious beliefs. *Gerhardt, supra*, 227 F.Supp.2d at 833.

All of the Petitioners make the common claim that they are arbitrarily and discriminatorily being denied access to religious literature by the Respondents. Petitioners Miller and Blankenship also allege that they are being denied access to religious medallions and religious ceremonial items substantially identical to those that inmate members of mainstream religions are allowed to have. Petitioners Miller, Blankenship, and Gerhardt further allege that they are denied opportunities for group worship that are granted to adherents of mainstream religions. In addition, the record contains evidence indicative of hostility of Ohio corrections officials toward

[3]*See* "Frequently Asked Questions about Asatru," available at http://www.runestone.org/faq.html last viewed on April 8, 2004.

[4]Merriam-Webster's Encyclopedia of World Religions, Springfield, Mass., 1999, p. 971. Mr. Cutter is no longer incarcerated at ODRC.

[5]Plaintiff-Appellees' brief filed in the Sixth Circuit, p. 7.

accommodation of religious exercise of non-mainstream religions in general. *See, infra*, p. 14.

Each of the Petitioners' cases was filed prior to the effective date of RLUIPA and relied heavily on the claims that the burdens imposed on their religious exercise violated the Free Exercise Clause and the Equal Protection Clause. Following September 22, 2000, RLUIPA's effective date, the complaint in each of Petitioners' cases was amended to include a claim for relief based on the violation of RLUIPA. Pursuant to an agreement between the parties, the cases were consolidated before a single district judge for the sole purpose of deciding Respondents' partial motion to dismiss which argued, among other things, that RLUIPA was unconstitutional because it violated the Establishment Clause, exceeded Congress' spending authority, and exceeded its power to legislate pursuant to the Commerce Clause. Because the Respondents challenged the constitutionality of a statute enacted by Congress, the Attorney General of the United States was informed of the proceedings and intervened as a plaintiff for the sole purpose of the defending the statute.

The Respondents' challenge to RLUIPA's constitutionality was initially considered by Magistrate Judge Terence P. Kemp, who filed a Report and Recommendation on August 27, 2001, concluding that RLUIPA was constitutional because it was within Congress' spending power and did not violate the Establishment Clause. (Appendix B). On February 25, 2002, District Judge Edmund A. Sargus, Jr. issued an opinion adopting the Magistrate Judge's Report and Recommendation and

upholding the constitutionality of RLUIPA. (Appendix B). The District Court's decision was certified for appeal on August 4, 2003, and the Sixth Circuit granted leave for the parties to proceed with an interlocutory appeal on September 23, 2003.

On November 7, 2003, after considering briefs and argument, the Sixth Circuit held that RLUIPA was unconstitutional because it violated the Establishment Clause. It subsequently denied petitions for rehearing en banc filed by the Petitioners and by the United States.

REASONS FOR THE GRANTING OF THE PETITION

A. The Decision in the Court Below Creates a Split Between the Circuits

The Sixth Circuit's decision creates a direct conflict with the decisions of three other circuits upholding the constitutionality of RLUIPA and is in square conflict with applicable precedents of this Court. Prior to the Sixth Circuit's ruling, *Mayweathers v. Newland*, 314 F.3d 601 (9th Cir. 2002) upheld RLUIPA's constitutionality under Congress' spending power and the Establishment Clause in a case brought by a Muslim inmate alleging that prison rules penalizing attendance of Friday afternoon services violated RLUIPA. *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) upheld RLUIPA against an Establishment Clause challenge in a case brought by Muslim inmate because prison officials enacted rules prohibiting his possession of fragrant Islamic prayer oil to be spread on the body as part of a religious exercise even though other inmates are permitted to possess and use fragrant body oils and lotions for non-religious purposes.

Approximately a month after the Sixth Circuit's decision in this case, *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) upheld the constitutionality of RLUIPA against an Establishment Clause attack in a case brought by a Hebrew Israelite inmate, whose religion honors, but does not worship, Jesus Christ. Prison officials denied the inmate the kosher diet required by his religious beliefs even though the same diet is available to Jews who observe Jewish dietary laws.

Madison, *Charles*, and *Mayweathers* all correctly concluded -- with appropriate citations to *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), *Board of Education v. Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), and other relevant decisions of this Court – that the challenges to RLUIPA were governed by the settled rule that a legislative accommodation lifting a substantial government-imposed burden on religious exercise does not violate the Establishment Clause. *Madison*, 355 F.3d at 317; *Charles*, 348 F.3d at 610-611; *Mayweathers*, 313 F.3d at 1068-1069.

The Sixth Circuit's opinion in this case candidly conceded that the scope of the split between the circuits is even more serious than indicated by the difference between its opinion in this case and the opinions of the three other circuits. It observed that, in addition to court of appeals decisions rejecting Establishment Clause attacks on RLUIPA, "five circuits, including the Seventh and the Ninth, have concluded that the identical language in RFRA [the Religious Freedom Restoration Act of 1993] does not violate the Establishment Clause." 349 F.3d 261-262. Moreover, the two district court opinions, that

the Sixth Circuit relied on as its authority, have been overruled or reversed. See *Madison v. Riter*, 240 F.Supp.2d 566 (W.D.Va. 2003), *reversed by Madison v. Riter*, 355 F.3d 310, (4th Cir. 2003) (*cert. pending*, No. 1404.); *Kilaab Al Ghashiyah (Kahn) v. Dept. of Corrections*, 250 F.Supp. 2d 1016 (E.D. Wis. 2003), *overruled by Charles v. Verhagen*, 348 F.3d 601 (7th Cir. Oct 30, 2003).

In short, the decision of the Sixth Circuit Court of Appeals creates a serious circuit split.

B. The Court of Appeals' Ruling that RLUIPA is Unconstitutional Undermines the Authority of All Legislatures to Enact Laws Accommodating Religious Exercise

The decision of the Sixth Circuit in this case provided an erroneous answer to the important question of whether Congress' enactment of RLUIPA to lift unjustified, government-imposed burdens on religious exercise violates the Establishment Clause. The three other circuits that have also addressed this question have correctly ruled that RLUIPA did not violate the Establishment Clause. Therefore, this Petition should be granted to resolve the split between the circuits and make clear that Congress and other legislative branches of government do not violate the Establishment Clause by enacting RLUIPA and similar laws.

As previously explained, the language of RLUIPA that is at the heart of this appeal provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to [a state] institution" unless the "imposition of the burden on that person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling

governmental interest." 42 U.S.C. § 2000cc-1(a).

Congress enacted this statute for the purpose of preventing the imposition of unjustified burdens on, and widespread discrimination against, the religious exercise of prisoners and other institutionalized individuals. See the statements of co-sponsor Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01, S7775 (2000). As already indicated in the statement of the case, the record in this case and the facts of the other Court of Appeals decision upholding the constitutionality of RLUIPA demonstrate that Congress' concern about arbitrary and discriminatory official treatment of the religious exercise of institutionalized persons is no chimera.

The Sixth Circuit's primary error was its failure to recognize that RLUIPA is constitutional because it is completely consistent with *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, supra.* In *Amos*, this Court held that Congress does not establish religion by enacting a wholesale exemption which lifts a governmentally-imposed burden on religious organizations in order to accommodate their religious exercise. The burden in *Amos* was imposed in the form of a federal statute prohibiting religious discrimination in employment. The burden was lifted by inclusion of a broad statutory exemption that excused religious organizations from having to comply with the anti-employment discrimination law. According to the *Amos* opinion, "it is a permissible legislative purpose to alleviate significant government interference with the ability of religious organizations to carry out their religious missions." 483 U.S. at 335.

The Court of Appeals misapplied *Amos* in several ways. First, the Court stated as a premise that the Free Exercise rights of prisoners are ordinarily limited by the relaxed standard of *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabbaz*, 482 U.S. 342 (1987). 349 F.3d at 263-264. Then, based on this premise, it mistakenly concluded that a prison regulation that complies with *Turner* and *O'Lone* imposes no burden on religious exercise that RLUIPA can lift. Therefore, in its mistaken view, a statutory accommodation that provides more protection for inmates' religious exercise than do *Turner* and *O'Lone* violates the Establishment Clause. *Id.* In other words, according to the Sixth Circuit, the only government burden that Congress can lawfully accommodate is one that creates a violation of the Establishment Clause and, presumably, the Free Exercise Clause. *Id.*

However, this Court has never held that a legislative accommodation of religion is unconstitutional merely because it exceeds the deferential Establishment Clause and Free Exercise Clause standards applicable to prisoners. Indeed, in *Madison v. Riter*, the Fourth Circuit explicitly concluded that such an accommodation was permissible. There, Judge Wilkinson observed that "The deferential test that courts customarily apply to prison regulations, however, does not operate to prevent legislative bodies from adopting a more searching standard." *Madison, supra at* 315, n. 1.

Judge Wilkinson's observation is clearly correct because this Court has consistently invited legislatures to accommodate religion without regard to whether the legislative accommodation mirrors pre-existing Establishment Clause and Free Exercise

Clause standards. In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), this Court stated:

> Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather there is "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. . . .'"

512 U.S. at 705, quoting *Amos*, supra at 334. In a concurring opinion, Justice Kennedy observed that "'[t]he limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause." 512 U.S. at 724, quoting *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 673 (1970).

Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872 (1990), explicitly invited legislative accommodation of religious exercise by means of statutes enacted to lift constitutionally permissible, but nonetheless onerous, government burdens on religious exercise.

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. Congress accepted this invitation when it enacted RLUIPA.

The Court of Appeals also erroneously concluded that RLUIPA had the improper effect of establishing religion because it accommodated religious exercise without simultaneously accommodating all other fundamental constitutional rights. 349 F.3d at

264-267. In its view, such an accommodation violates the Establishment Clause because it carries a message of endorsement of religion and because Congress did not support RLUIPA with actual proof that religious rights were more at risk in a prison setting than other fundamental rights.

The principal authority it cites for the foregoing proposition is the district court decision in *Madison v. Riter*, 240 F.Supp.2d 566 (W.D.Va. 2003). However, following the Sixth Circuit's heavy reliance on that decision, it was reversed on appeal by the Fourth Circuit. *Madison v. Riter, supra.* The reversal was based in part on the admonition in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, supra,* that "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Madison v. Riter*, 355 F.3d at 318, citing *Amos*, 483 U.S. at 338. The Fourth Circuit explained:

> We cannot accept the theory advanced by the district court that Congress impermissibly advances religion when it acts to lift burdens on religious exercise yet fails to consider whether other rights are similarly threatened. *Madison*, 240 F.Supp. 2d at 577; see also *Cutter v. Wilkinson*, No. 02-3270, 2003 WL 22513973, at *7-8 (6th Cir. Nov. 7, 2003). There is no requirement that legislative protections for fundamental rights march in lockstep. The mere fact that RLUIPA seeks to lift government burdens on a prisoner's religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights.

Madison, supra, at 318. (A petition for certiorari from the Fourth Circuit's decision in *Madison* is currently pending before this Court *sub nom. Bass v. Madison, supra*).

The Sixth Circuit's insistence that RLUIPA advances religion by accommodating religious exercise without simultaneously accommodating all other constitutional rights

misses the entire point for the enactment of RLUIPA. It is clear that RLUIPA was enacted for the express purpose of preventing arbitrary and discriminatory treatment of religious exercise; this is indicated in the Congressional Record. See, for example the statement of Representative Canady at 146 Cong. Rec. H1791. Congress' recognition of the need for RLUIPA is also supported by the arbitrary and discriminatory treatment of the Petitioners' non-mainstream religions as well as the facts of the four Court of Appeals cases that have already addressed RLUIPA's constitutionality. See, *supra* at pp. 6-7.

What the Sixth Circuit failed to understand is that selective accommodation of fundamental rights is the norm for prison inmates. For example, an inmate can marry while in prison. *Turner v. Safley, supra.* Yet, the same prisoner cannot join a prisoners' union. *Jones v. North Carolina Prisoners Union*, 433 U.S. 119 (1977). Similarly, an inmate can send confidential letters to his attorney, but does not have a right to a private interview with a member of the press. *Houchins v. KQED*, 438 U.S.1 (1978). Of all fundamental rights, accommodation of religion is most suitable in the prison context. It is for this reason that the State of Ohio has long employed full-time prison chaplains to assure inmates of mainstream religions will have access to clergy.

The Sixth Circuit also erroneously concluded that the Establishment Clause had been violated because Congress enacted RLUIPA without establishing a specific factual basis to support its conclusion that religious rights were more at risk than other rights in a prison setting. 349 F.3d at 265. It cited no authority for this contention other than the

district court decision in *Madison, supra*, which was subsequently reversed . Nor could it cite such authority. None exists.

Even if there were a need for evidence that religious rights are at special risk in order to justify RLUIPA, there is already evidence of ODRC hostility towards non-mainstream religions in the record of this case that is consistent with Congress' view that prison officials are often intolerant of such religions. During discovery, ODRC defendants produced an unusually candid inter-office memorandum from an Ohio prison chaplain written in response to an inmate request for religious accommodation. It stated, "I truly regret that the House of Yahweh is not a mainstream religion because that would help us come to a more agreeable resolution of some of your requests." ®. No. 179; Inter-office Communication, Aug. 6, 1996; Plaintiffs' Reply to Partial Motion to Dismiss. App. G.)

Equally telling is the brief filed in the Respondents' appeal to the Sixth Circuit in this case. It argued that Petitioners are not entitled to accommodation of their religious exercise because their beliefs are so offensive that public funds spent to accommodate their beliefs will result in criticism of Ohio corrections officials for "such patently offensive use of public resources." (Defendant-Appellants' Opening Brief on Appeal, p. 60). Also, see *Flagner v. Wilkinson*, 241 F.3d 475 (6th Cir. 2001), which held that a complaint alleging that ODRC officials forcibly removed the beard of an inmate who was a member of a non-mainstream branch of Judaism stated a claim for injunctive relief. The holding was premised on the fact that the beard was an element of the

inmate's religious exercise.

A grant of this Petition for Certiorari is particularly important because the Sixth Circuit's holding and rationale are so sweeping that, if its opinion stands, any court that applies it will be required to strike down all accommodations that do not remedy full-fledged violations of the Free Exercise or Establishment Clauses. The opinion will require invalidation of state and federal statutes and regulations modeled on the religious accommodation previously approved by this Court's decision in *Amos*. For example, the United States Air Force would be prohibited from authorizing the wearing of religious head coverings by Air Force personnel while in uniform because the accommodation is not required by the Free Exercise Clause and no such accommodation is granted to non-religious, expressive apparel. Compare *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that Free Exercise Clause does not bar disciplining of uniformed, Jewish Air Force officer for wearing a yarmulke) with subsequently promulgated Dept. of Air Force, Reg. 35-10, ¶ 2- 28(b)(2) (April 1989) (authorizing the wearing of religious head covering while in uniform).[9] Public school authorities would be forbidden from implementing the released-time programs permitting public school children to attend periodic, off-site, religious instruction approved in *Zorach v. Clausen*, 343 U.S. 306 (1952), because no corresponding leave is granted to children wishing to receive off-site, secular instruction. States would be forbidden from enacting laws accommodating the

[9]This accommodation was cited with approval by Justice Kennedy in *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 726-727 (1994) (Kennedy, J., concurring).

sacramental use of peyote by American Indians notwithstanding *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. at 890, because those accommodations are not extended to other drugs, or to peyote use as a political protest of existing drug laws.

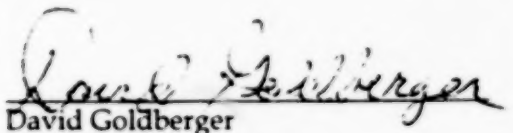
For the same reasons, it would be impermissible for any departments of corrections to hire prison chaplains ordained as ministers in mainstream religions to administer and provide for the religious needs of prison inmates. It would also be impermissible for states to exempt ordained ministers from the general rule that no one shall render services or engage in the practice of psychology without a license. See O.R.C. § 4732.22(F). And, it would be impermissible for states to exempt religious groups from general prohibitions against the inhumane slaughtering of animals where the prohibition would hinder the religious freedom of that group. See O.R.C. 945.01-945.02. But see *Jones v. Butz*, 374 F.Supp. 1284 (S.D.N.Y. 1974), aff'd 419 U.S. 806 (1974) (holding that federal statute exempting religious, ritual slaughter from animal slaughter regulations does not violate the Establishment Clause).

The foregoing examples underscore the sweeping limitations that will be imposed on legislative efforts to accommodate religious exercise, should this Court allow the Sixth Circuit's decision to stand.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,



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LEXSEE 349 F.3D 257

JON B. CUTTER; J. LEE HAMPTON, Plaintiffs-Appellees, UNITED STATES OF AMERICA, Intervenor-Appellee, v. REGINALD WILKINSON; DAVID SCHWARTZ; NICHOLAS G. MENEDEZ; L. C. COVAL; K. L. BROWN; GEORGE D. ALEXANDER; DIANNE WALKER; JIM ERWIN; RON CARNEIN; RUDY PRINGLE; WALTER LOWERY, Defendants-Appellants. JOHN MILLER, et al., Plaintiffs-Appellees, UNITED STATES OF AMERICA, Intervenor-Appellee, v. REGINALD WILKINSON; DAVID SCHWARTZ; TERRY COLLINS; CHERYL HART; CHARLES R. GRIFFIN; CHARLES GRIFFIN, CHAPLAIN, DEFENDANTS-APPELLANTS. JOHN W. GERHARDT, Plaintiff-Appellee, UNITED STATES OF AMERICA, Intervenor-Appellee, v. ALAN LAZAROFF, WARDEN; KENNETH BYERS; DON WILSON; MARY HENDERSON; SHERRY WILLIAMSON; KRISTINA HACKETT; STEVEN WEINGART; RON CLIFTON; ROBERT ENGLUND; CHARLES CONRAD; STACHA DOTY; JACK TAYLOR; WILLIAM BLANEY; CAROL MARTIN; JUNE COLEMAN; DAVE MORRIS; VANCE YORK; SUSAN COOLIE; STEPHANIE WALKER; RACHEL HETTINGER; KENNETH E. MCDONALD, Defendants-Appellants.

Nos. 02-3270/02-3299/02-3301

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

349 F.3d 257; 2003 U.S. App. LEXIS 22840; 2003 FED App. 0397P (6th Cir.)

September 10, 2003, Argued
November 7, 2003, Decided
November 7, 2003, Filed

SUBSEQUENT HISTORY: Counsel Corrected December 15, 2003. Rehearing denied by *Cutter v. Wilkinson, 2004 U.S. App. LEXIS 4294 (6th Cir., Mar. 3, 2004)*
US Supreme Court certiorari granted by, Motion granted by *Cutter v. Wilkinson, 160 L. Ed. 2d 221, 125 S. Ct. 308, 2004 U.S. LEXIS 6695 (U.S., 2004)*
Reversed by, Remanded by *Cutter v. Wilkinson, 2005 U.S. LEXIS 4346 (U.S., May 31, 2005)*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 97-00382; 98-00275; 95-00517. James L. Graham, Edmund A. Sargus, Jr., District Judges.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff prisoners contended that defendant corrections officials violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5. The officials filed motions to dismiss the RLUIPA claims, challenging the constitutionality of *42 U.S.C.S. § 2000cc-1*, which were denied by the United States District Court for the Southern District of Ohio at Columbus. The officials sought interlocutory appeal.

OVERVIEW: The court reasoned that the RLUIPA, as applied to institutionalized persons--specifically, *42 U.S.C.S. § 2000cc-1*--violated the Establishment Clause because it had the primary effect of advancing religion. The court noted that RLUIPA's enhanced protection for religious rights might not have violated the First Amendment requirement of neutrality if Congress had enacted RLUIPA based upon evidence that religious rights were at greater risk of deprivation in the prison system than other fundamental rights. Furthermore the primary effect of RLUIPA was not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners. The court noted that in addition to its message of endorsement, RLUIPA also had the effect of encouraging prisoners to become religious in order to enjoy greater rights. The court rejected the reasoning of previous cases upholding RLUIPA because RLUIPA did not address a particular burden on religious exercise, but instead exempted religious prisoners from many generally applicable prison regulations.

OUTCOME: The district court's denial of the corrections officials' motions to dismiss was reverse and the case was remanded for further proceedings.

LexisNexis(R) Headnotes

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
[HN1] The Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, defines "religious exercise" as any exercise of religion, whether or not compelled by, or central to, a system of religious belief. *42 U.S.C.S. § 2000cc-5*(7)(A).

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
[HN2] The requirement of the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, requiring strict scrutiny stands in sharp contrast to the United States Supreme Court's previous decisions, which have held that the courts should apply a rational-relationship review to restrictions upon inmates' fundamental rights.

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
Real & Personal Property Law > Zoning & Land Use > Statutory & Equitable Limits
[HN3] The Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, creates a private right of action. Any person may assert a violation of chapter 21C, *42 U.S.C.S. § 2000cc* et seq., as a claim or defense in a judicial proceeding and may obtain appropriate relief against a government. *42 U.S.C.S. § 2000cc-2*(a). The United States may also seek injunctive or declaratory relief to enforce the statute. *42 U.S.C.S. § 2000cc-2*(f).

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN4] See U.S. Const. amend. I.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN5] Neutrality is the fundamental requirement of the Establishment Clause, which prohibits government from either endorsing a particular religion or promoting religion generally. A principle at the heart of the Establishment Clause is that government should not prefer one religion to another, or religion to irreligion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN6] The United States Supreme Court has articulated a three-part test to determine whether a statute violates the Establishment Clause. A statute (1) must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not create excessive government entanglement with religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN7] The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. Lemon's requirement of a secular purpose does not mean that the law's purpose must be unrelated to religion. Instead, the purpose prong aims at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN8] It is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN9] That portion of the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, that applies to institutionalized persons specifically, *42 U.S.C.S. § 2000cc-1* is unconstitutional because it has the primary effect of advancing religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN10] The effect prong of the Lemon test asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. In evaluating this prong, the two most relevant factors are (1) whether a particular government action benefits both secular and religious entities, and (2) whether the action will induce religious exercise, rather than only protecting it.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN11] The Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights.

Constitutional Law > Civil Rights Enforcement > Prisoners
[HN12] Prior to the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, restrictions imposed by prison officials upon inmates' fundamental rights were subject to a rational-relationship review which requires courts to consider: (1) whether there is a valid, rational connection between the prison regulation and a legitimate government interest; (2) whether inmates have alternative means of exercising the right in question; (3) the impact of a requested accommodation of the right upon guards and other inmates; and (4) the absence of alternatives to the regulation. The rational-relationship test has been applied to claimed violations of various fundamental rights, including the right to the free exercise of religion, the right to freedom of speech, the right to marry, the right to privacy, the right to meaningful access to the courts, and the right to be free from racial discrimination.

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN13] The primary effect of the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, is not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners. When Congress acts to lift the limitations on one right while ignoring all others, it abandons neutrality towards these rights, placing its power behind one system of belief. When the one system of belief protected is religious belief, Congress has violated the basic requirement of neutrality embodied in the Establishment Clause.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN14] In evaluating a statute's effect, a court must ask whether an objective observer, acquainted with the text, legislative history, and implementation of the enactment would view it as state endorsement of religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN15] When Congress has acted to impose an affirmative burden on religion, it is necessary for Congress to remove that burden in order to retain a position of neutrality towards religious belief. However, when Congress acts to provide religious inmates, and only religious inmates, with a level of constitutional protection that the United States Supreme Court has deemed unnecessary to protect religious rights, it has gone beyond protecting religion to affirmatively advancing it.

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN16] *42 U.S.C.S. § 2000cc-1* violates the Establishment Clause.

COUNSEL: ARGUED: Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellants.

David A. Goldberger, OHIO STATE UNIVERSITY COLLEGE OF LAW-CLINICAL PROGRAMS, Columbus, Ohio, Michael S. Raab, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellants.

David A. Goldberger, OHIO STATE UNIVERSITY COLLEGE OF LAW-CLINICAL PROGRAMS, Columbus, Ohio, Michael S. Raab, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Benson Wolman, WOLMAN, GENSHAFT & GELMAN, Columbus, Ohio, for Appellees.

Marc D. Stern, AMERICAN JEWISH CONGRESS, STEPHEN WISE CONGRESS HOUSE, New York, New York, for Amici Curiae.

JUDGES: Before: MOORE and GILMAN, Circuit Judges; TARNOW, District Judge. *

* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY: RONALD LEE GILMAN

OPINION: [*259] [***4]

RONALD LEE GILMAN, Circuit Judge. Plaintiffs in these three consolidated cases [**2] are Ohio prisoners who contend, among other claims, that various Ohio corrections officials have violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C. § 2000cc-2000cc-5*. The defendant officials filed motions to dismiss the RLUIPA claims, challenging the constitutionality of *42 U.S.C. § 2000cc-1*, the section of the Act that applies to institutionalized persons. Their motions were denied by the district court. In this interlocutory appeal, defendants contend that RLUIPA (1) exceeds Congress's powers under both the Spending and *Commerce Clauses*, (2) violates states' rights under the *Tenth Amendment*, and (3) improperly advances religion in violation of the *Establishment Clause of the First Amendment*. For the reasons [*260] set forth below, we agree that the portion of RLUIPA that applies to institutionalized persons--specifically, *42 U.S.C. § 2000cc-1*--violates the *Establishment Clause*. We therefore REVERSE the district court's denial of defendants' motions to dismiss and REMAND the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background [**3]

Because this appeal involves a facial challenge to RLUIPA, the facts of the individual cases are not particularly relevant. [***5] The prisoners in all three cases generally allege that officials with the Ohio Department of Rehabilitation and Corrections (ODRC) violated RLUIPA by refusing to accommodate the prisoners' religious beliefs and practices. Defendants, on the other hand, contend that RLUIPA has allowed inmate gangs to claim "'religious' status in order to insulate their illicit activities from scrutiny."

What *is* relevant to this case is the history and substance of RLUIPA. In 1990, the Supreme Court held that the United States Constitution does not require that government have a compelling state interest in order to enact a law of general applicability that incidentally burdens the exercise of religion. *Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*. Congress responded in 1993 by enacting the Religious Freedom Restoration Act (RFRA), *42 U.S.C. § § 2000bb--2000bb-4*. RFRA required that any governmental attempt to "substantially burden" the exercise of religion must be the [**4] least restrictive means of furthering a compelling state interest. *42 U.S.C. § 2000bb-1(b)*. The Supreme Court held RFRA unconstitutional insofar as it applied to states and localities because the statute exceeded Congress's powers under the *Fourteenth Amendment. City of Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997)*.

Congress reacted to *Boerne* by passing RLUIPA in 2000. RLUIPA has the same substantive standard as RFRA. It provides, in relevant part, that "no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest. *42 U.S.C. § 2000cc-1(a)*. [HN1] The Act defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *42 U.S.C. § 2000cc-5(7)(A)*. [HN2] RLUIPA's requirement of strict scrutiny stands in sharp contrast to the Supreme Court's previous decisions, which have held that the courts should [**5] apply a rational-relationship [***6] review to restrictions upon inmates' fundamental rights. *See Turner v. Safley, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)* (applying the rational-relationship test to prison rules regulating prisoner correspondence and marriage); *O'Lone v. Estate of Shabazz, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987)* (applying the rational-relationship test to prison rules regulating prisoners' religious exercise).

Congress enacted RLUIPA pursuant to its powers under the Spending Clause, *U.S. Const. art. I, § 8, cl. 1*, and the *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*. RLUIPA applies where "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance." *42 U.S.C. § 2000cc-1(b)(1)*. The Act is also applicable where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign [*261] nations, among the several States, or with Indian tribes." *42 U.S.C. § 2000cc-1(b)(2)*.

[HN3] RLUIPA creates a private right of action. Any person may "assert a violation [**6] of this chapter as a claim or defense in a judicial proceeding" and may obtain "appropriate relief against a government." *42 U.S.C. § 2000cc-2(a)*. The United States may also seek injunctive or declaratory relief to enforce the statute. *42 U.S.C. § 2000cc-2(f)*.

RLUIPA's congressional sponsors specifically noted that they expected federal courts to respect the decisions of prison officials as to what restrictions on the exercise of religion are necessary in the prison context. A joint statement to the Senate expressed the sponsors' belief that federal courts would "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with considerations of cost and limited resources." Statements of Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01, S7775 (2000). [***7]

B. Procedural background

The plaintiff prisoners brought suit against various Ohio corrections officials based upon claims arising under the *First* and *Fourteenth Amendments*. RLUIPA went into effect [**7] after suit was filed, causing plaintiffs to amend their complaints to include claims under the Act. Defendants then filed motions to dismiss the RLUIPA claims, arguing that the Act was unconstitutional. (All references to RLUIPA are to *42 U.S.C. § 2000cc-1* only, the portion of the Act that applies to institutionalized persons.) The United States intervened to defend the constitutionality of the Act. All three cases were consolidated in order to adjudicate the motions to dismiss at the same time.

On August 27, 2001, the magistrate judge filed a Report and Recommendation, which concluded that the statute was constitutional and recommended that the district court deny defendants' motions to dismiss. The district court entered an opinion and order adopting the Report and Recommendation on February 25, 2002. Approximately a year and a half later, on August 4, 2003, the court certified its February 25, 2002 order for immediate appeal pursuant to *28 U.S.C. § 1292(b)*. The parties then filed a joint petition for leave to appeal with this court on August 6, 2003, within the 10-day time limit imposed by the statute. We have previously granted [**8] the petition for leave to appeal.

II. ANALYSIS

A. Lineup of the courts

The Supreme Court has not yet considered the constitutionality of RLUIPA. Justice Stevens, however, in his concurring opinion in *Boerne*, concluded that RLUIPA's predecessor, RFRA, violated the *Establishment Clause*: [***8]

> In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a "law respecting an establishment of religion" that violates the *First Amendment to the Constitution*. . . . The statute has provided [religious organizations] with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the *First Amendment*.

Boerne, 521 U.S. at 536-37 (1997) (Stevens, J., concurring).

Two circuits, without reference to Justice Stevens's concurring opinion, have come to the opposite conclusion regarding the constitutionality of RLUIPA. *See* [*262] *Charles v. Verhagen, 348 F.3d 601, 2003 U.S. App. LEXIS 22297, No. 02-3572 (7th Cir. Oct. 30, 2003)*; *Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002)*. Furthermore, five circuits, including the Seventh and Ninth, have concluded that the identical operative [**9] language in RFRA does not violate the *Establishment Clause*. *See In re Young), 141 F.3d 854, 863 (8th Cir. 1998)*; *Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir. 1997)*; *Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114, 138 L. Ed. 2d 1007, 117 S. Ct. 2502 (1997)*; *EEOC v. Catholic Univ. of Am., 317 U.S. App. D.C. 343, 83 F.3d 455, 470 (D.C. Cir. 1996)*; *Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), rev'd on other grounds, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1998)*. Two district court opinions, in addition to the one below, have also concluded that RLUIPA is constitutional. *See Johnson v. Martin, 223 F. Supp. 2d 820 (W.D. Mich. 2002)*; *Charles v. Verhagen, 220 F. Supp. 2d 955 (W.D. Wis. 2002), aff'd, 2003 U.S. App. LEXIS 22297, No. 02-3572 (7th Cir. Oct. 30, 2003)*.

Against this apparent juggernaut of circuit and district court opinions stand two district court decisions that reach the opposite conclusion. One is *Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003)* (Turk, J.), and the other is [**10] *Kilaab Al Ghashiyah (Khan) v. Dep't of Corrections, 250 F. Supp. 2d 1016 (E.D. Wis. 2003)* (Adelman, J.), *overruled by Charles v. Verhagen,* [***9] *2003 U.S. App. LEXIS 22297, No. 02-3572 (7th Cir. Oct. 30, 2003)*. Both are remarkably well-worded and persuasive opinions that clearly set forth the history of RLUIPA, the analytical basis for concluding that RLUIPA violates the *Establishment Clause*, and the unpersuasive nature of the contrary opinions. Indeed, our own analysis can (and will) be considerably streamlined by repeated references to *Madison* and *Ghashiyah*. (Inexplicably, the Seventh Circuit in *Charles* makes no reference to either of these district court opinions.)

B. RLUIPA violates the *Establishment Clause* because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation

The *Establishment Clause of the First Amendment to the U.S. Constitution* states: [HN4] "Congress shall make no law respecting an establishment of religion." [HN5] Neutrality is the fundamental requirement of the *Establishment Clause*, which prohibits government from either endorsing a particular religion or promoting religion generally. [**11] *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703, 129 L. Ed. 2d 546, 114 S. Ct. 2481 (1994)* ("[A] principle at the heart of the *Establishment Clause* [is] that government should not prefer one religion to another, or religion to irreligion."); *see also Ghashiyah, 250 F. Supp. 2d at 1021* (collecting cases that discuss the neutrality requirement).

In *Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*, [HN6] the Supreme Court articulated a three-part test to determine whether a statute violates the *Establishment Clause*. A statute (1) "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it must not create "excessive government entanglement with religion." *Id. at 612-13* (internal quotation marks and citations omitted). The Supreme Court suggested a modification to the *Lemon* test in *Agostini v. Felton, 521 U.S. 203, 232-35, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997)*, in the context of considering the [***10] constitutionality of government aid to parochial schools, [**12] where the Court proceeded to analyze entanglement under the effect prong rather than as a [*263] separate factor. Based upon our precedent of applying the *Lemon* test other than in aid-to-education cases, however, we will proceed with the traditional three-part *Lemon* analysis. *See, e.g., Adland v. Russ, 307 F.3d 471, 479 (6th Cir. 2002)* (applying the *Lemon* test to decide that a Kentucky legislative resolution directing the state to move a Ten Commandments monument to a permanent site on the state capitol grounds violated the *Establishment Clause*).

1. The purpose of RLUIPA

[HN7] "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard, 482 U.S. 578, 585, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)* (quoting *Lynch v. Donnelly, 465 U.S. 668, 690, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)* (O'Connor, J., concurring)). *Lemon*'s requirement of a secular purpose "does not mean that the law's purpose must be unrelated to religion . . . ." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987)*. [**13] Instead, the purpose prong "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.*

In *Amos*, the Supreme Court considered whether Congress had violated the *Establishment Clause* by exempting religious organizations from Title VII's prohibition against religious discrimination in employment. *Amos* held that [HN8] "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* In the present case, plaintiffs argue that RLUIPA has a virtually identical purpose: to alleviate significant interference by prison officials with the ability of prisoners to exercise their religious beliefs. But material [***11] differences exist between the application of RLUIPA in a prison setting and the Title VII exemption at issue in *Amos*.

One key difference is that the exemption in *Amos* was arguably necessary to avoid a violation of the *Establishment Clause*. Without the exemption, Title VII would have required courts to interfere [**14] with the internal workings of religious organizations, and fear of liability might have affected the way religious organizations carried out their missions. *Id. at 336*; *see also id. at 344* (Brennan, J., concurring) ("A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity."). Enacting RLUIPA, on the other hand, was not even arguably necessary to avoid a violation of the *Establishment Clause*. The Supreme Court had previously held that government interference with prisoners' fundamental rights is not subject to strict scrutiny, as RLUIPA requires, but only to a rational-relationship review. *See Turner, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254*; *O'Lone, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400*.

Another key difference between RLUIPA and the exemption in *Amos* is that RLUIPA sweeps much more broadly. As one commentator noted about RFRA, the predecessor to RLUIPA that has identical substantive provisions:

> Comparing RFRA to *Amos* is like comparing apples to oranges. RFRA, unlike [**15] *Amos*, does not exempt religion from regulation for the purpose of avoiding an *Establishment Clause* violation. Rather, RFRA institutes a standard of review in every case which implicates religious conduct. . . . *Amos* did not involve [*264] a law that exempted religion from every law in the country. Rather, it permitted the exemption of religious employers from a particular requirement in prescribed circumstances. The law in *Amos* lacked RFRA's vast scope; therefore, [***12] *Amos* cannot dictate how RFRA fares under the *Establishment Clause*.
>
> Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period, 1 U. Pa. J. Const. L. 1, 13-14 (1998)*.

The broader scope of RLUIPA suggests that its actual purpose is not to accommodate religion by removing a particular obstacle to religious exercise, but "to advance religion in prisons relative to other constitutionally

protected conduct." *Ghashiyah, 250 F. Supp. 2d at 1024.* If that is indeed the true purpose of RLUIPA, then Congress has "abandoned neutrality and acted with the purpose of furthering religion," in violation of the *Establishment Clause*'s fundamental command of [**16] governmental neutrality. *Id. at 1025.*

Resolution of the question of whether RLUIPA has the proper purpose of alleviating government interference with religious exercise or the prohibited purpose of advancing religion in prisons is not necessary to our ultimate decision regarding the Act's constitutionality. Even if the purpose of RLUIPA fits within the rule of *Amos*, [HN9] RLUIPA is still unconstitutional because it has the primary effect of advancing religion. *See Amos, 483 U.S. at 334-35* ("At some point, accommodation may devolve into an unlawful fostering of religion . . . .") (internal quotation marks omitted).

2. The effect of RLUIPA

[HN10] "The effect prong [of the *Lemon* test] asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly, 465 U.S. 668, 690, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)* (O'Connor, J., concurring). In evaluating this prong, the two most relevant factors are (1) whether a particular government action benefits both secular and religious entities, and [***13] (2) whether the action will induce religious [**17] exercise, rather than only protecting it. *See Ghashiyah, 250 F. Supp. 2d at 1025-26* (collecting authorities that have used these factors in *Establishment Clause* cases). Applying these factors to the present case demonstrates that [HN11] RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights.

[HN12] Prior to RLUIPA, restrictions imposed by prison officials upon inmates' fundamental rights were subject to a rational-relationship review, *see Turner, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254*; *O'Lone, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400*, which requires courts to consider: (1) whether there is a "valid, rational connection" between the prison regulation and a legitimate government interest; (2) whether inmates have alternative means of exercising the right in question; (3) the impact of a requested accommodation of the right upon guards and other inmates; and (4) the absence of alternatives to the regulation. *Turner, 482 U.S. at 89-90.* The rational-relationship test has been applied to claimed violations of various fundamental [**18] rights, including the right to the free exercise of religion, *O'Lone, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400*, the right to freedom of speech, *Amatel v. Reno, 332 U.S. App. D.C. 191, 156 F.3d 192 (D.C. Cir. 1998)*, the right to marry, *Turner, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254*, the right to privacy, *Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002)*, the right to meaningful access to the courts, *Lewis v. Casey, 518 U.S. 343,* [*265] *135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996)*, and the right to be free from racial discrimination, *Morrison v. Garraghty, 239 F.3d 648 (4th Cir. 2001).*

In contrast to the highly deferential rational-relationship test, RLUIPA requires courts to apply strict scrutiny to all substantial burdens upon the free exercise of religion. *Madison* eloquently explained the dramatic changes imposed by RLUIPA:

> Under RLUIPA, prison regulations that substantially burden religious belief, including those that are generally [***14] applicable and facially neutral, are judged under a strict scrutiny standard, requiring prison officials, rather than the [**19] inmate, to bear the burden of proof that the regulation furthers a compelling penological interest and is the least restrictive means of satisfying this interest. *42 U.S.C. § 2000cc-1.* As is well known from the history of constitutional law, the change that RLUIPA imposes is revolutionary, switching from a scheme of deference to one of presumptive unconstitutionality. *See Smith, 494 U.S. at 888.* Instead of rational, the penological interest under RLUIPA must be of the highest order, *see Wisconsin v. Yoder, 406 U.S. 205, 215, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972)*; *Jenkins v. Angelone, 948 F. Supp. 543, 546 (E.D. Va. 1996)*; instead of focusing on the prison inmate's ability to find other avenues to exercise his belief, a court is required to focus on the prison administrator's choice among regulatory options, *see 42 U.S.C. § 2000cc-1(a)(2)*; instead of placing the burden of proof on an inmate, RLUIPA throws the burden on prison officials, *see id. § 2000cc-1(a).* It is hard to imagine a greater reversal of fortunes for the religious rights of inmates than the one involved [**20] in the passage of RLUIPA.
>
> *240 F. Supp. 2d at 575.*

RLUIPA's enhanced protection for religious rights might not violate the *First Amendment* requirement of neutrality if Congress had enacted RLUIPA based upon evidence that religious rights are at greater risk of deprivation in the prison system than other fundamental rights. The exemption in *Amos*, for example, had the effect of maintaining congressional neutrality toward religion because "Title VII's prohibitions on hiring or firing on the basis of religion had a much greater negative impact on the purpose and mission of a religious organization in comparison to the effect of the prohibitions on a secular institution." *Madison, 240 F. Supp. 2d at 577 n.9.* In contrast, Congress enacted RLUIPA "in the absence of any proof that religious rights are more at

risk [***15] in prison than other fundamental rights, with the knowledge that strict scrutiny is not required to protect the religious belief of prisoners under the *Free Exercise Clause*," *Madison, 240 F. Supp. 2d at 576*, and with the knowledge that prisoners already have a remedy for violations of their constitutional rights. [**21] "Such an action, while labeled a neutral 'accommodation,' is not in fact neutral at all, and the Court is not allowed to defer to the mere characterization of RLUIPA as such." *Id. at 576*; *see also Ghashiyah, 250 F. Supp. 2d at 1027* ("The effect [of RLUIPA], therefore, is to provide greater protection to religiously motivated conduct than other conscientious conduct.").

Although the supporters of RLUIPA stated that "some institutions restrict religious liberty in egregious and unnecessary ways," *see* Statements of Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01, S7775 (2000), RLUIPA supporters offered no evidence that inmates' other constitutional [*266] rights "are not similarly threatened by prison administrators," *Madison, 240 F. Supp. 2d at 575.* And if prison officials in fact "restrict religious liberty [or other fundamental rights] in egregious and arbitrary ways," prisoners already have a remedy under *Turner* and *O'Lone*, which require prison policies to be "legitimate and neutral," *Turner, 482 U.S. at 90*, and which held that strict scrutiny is not necessary to protect the religious rights of prisoners. [**22] *Ghashiyah, 250 F. Supp. 2d at 1031* (noting that *O'Lone* already provides prisoners a remedy for violations of their religious rights).

Madison provides an excellent illustration of the effect of RLUIPA upon the rights of prisoners:

> Assume, for example, that a prison official confiscates white supremacist literature held by two different inmates. One inmate is a member of the Aryan Nation solely because of his fanatical belief that a secret Jewish conspiracy exists to control the world. The second [***16] inmate holds the white supremacist literature because he is a member of the Church of Jesus Christ Christian, Aryan Nation ("CJCC"). The non-religious inmate may challenge the confiscation as a violation of his rights to free expression and free association. A court would evaluate these claims under the deferential rational relationship test in *Turner*, placing a high burden of proof on the inmate and leaving the inmate with correspondingly dim prospects of success. However, the religious inmate, as a member of the CJCC, may assert a RLUIPA claim, arguing that the confiscation places a substantial burden on his religious exercise. The religious [**23] white supremacist now has a much better chance of success than the non-religious white supremacist, as prison officials bear the burden of proving that the prison policy satisfies a compelling interest and is the least restrictive means of satisfying the interest. The difference in the level of protection provided to each claim lies not in the relative merits of the claims, but lies instead in the basis of one claim in religious belief.
>
> *240 F. Supp. 2d at 576* (internal citations omitted). As this example illustrates, [HN13] the primary effect of RLUIPA is not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners. "When Congress acts to lift the limitations on one right while ignoring all others, it abandons neutrality towards these rights, placing its power behind one system of belief. When the one system of belief protected is religious belief, Congress has violated the basic requirement of neutrality embodied in the *Establishment Clause*." *Madison, 240 F. Supp. 2d at 577* (internal citations omitted).

In addition to [**24] its message of endorsement, RLUIPA also has the effect of encouraging prisoners to become religious in order to enjoy greater rights. The Supreme Court has [***17] considered a statute's effect on nonreligious persons as part of the effect analysis. *See Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9, 103 L. Ed. 2d 1, 109 S. Ct. 890 (1989)* (plurality opinion) (holding that government may not compel nonadherents to support religious practices). One effect of RLUIPA is to induce prisoners to adopt or feign religious belief in order to receive the statute's benefits. As *Ghashiyah* explained:

> When inmates see that the rules do not apply with the same force to the religious as to the agnostic or atheist . . ., non-religious prisoners will know what they have to do so that they, too, can benefit from the softer rules: become religious. Considering the meager resources [*267] and opportunities available to them inside prison walls, the compulsion to become religious--created by government--will indeed be strong.
>
> *250 F. Supp. 2d at 1029.*

[HN14] In evaluating a statute's effect, a court must ask "whether an objective observer, acquainted with the [**25] text, legislative history, and implementation of the enactment would view it as state endorsement of religion." *Adland v. Russ, 307 F.3d 471, 484 (6th Cir.*

2002) (internal quotation marks omitted). RLUIPA's legislative history, as previously discussed, offers no evidence that religious rights are at any greater danger of deprivation in prison than are other fundamental rights. As to implementation, RLUIPA's inevitable effect is to give greater freedom to religious inmates, and to induce nonreligious inmates to adopt a religion. An objective observer viewing RLUIPA's text, legislative history, and effect would therefore conclude that the Act conveys a message of religious endorsement.

Plaintiffs, however, point to the following statement from *Amos*: "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *483 U.S. at 337* [***18] (emphasis in original). *Amos* held that the exemption from Title VII did not run afoul of the effect prong of *Lemon* because the government was not an active participant; the statute simply allowed religious [**26] organizations to pursue their religious objectives. *Id.* Plaintiffs contend that RLUIPA has an identical effect. RLUIPA, according to plaintiffs, "does not itself promote or subsidize a religious belief or message; it merely frees religious groups and individuals to practice as they otherwise would in the absence of certain significant state-imposed burdens."

The problem with plaintiffs' argument is that the exemption from Title VII that was at issue in *Amos* simply restored the level of freedom that religious institutions enjoyed before Congress enacted Title VII. By creating the exemption, Congress arguably acted to maintain neutrality toward religion. RLUIPA, on the other hand, does not lift any affirmative burden on the exercise of religion. Instead, by enacting RLUIPA, Congress itself has advanced religion by giving religious prisoners a preferred status in the prison community.

3. The entanglement between government and religion created by RLUIPA

The third prong of the *Lemon* test prohibits an excessive entanglement of government with religion. *Lemon, 403 U.S. at 613*. *Ghashiyah* held that RLUIPA's nebulous definition of religious exercise, [**27] *see 42 U.S.C. § 2000cc-5(7)(A)*, creates an excessive entanglement "because it forces the states to become involved with, knowledgeable about, and exceedingly sensitive to the varied religious practices of their inmates. It also forces the federal courts to become involved in prison administration, an area that the Supreme Court has admonished judges to avoid." *250 F. Supp. 2d at 1031*.

Although *Ghashiyah*'s reasoning is plausible, we question whether RLUIPA requires any greater interaction between [***19] government officials and religion than exists under present law. Assume, for example, that a prisoner who is a member of a nontraditional "religion" claims a *First Amendment* right to a special diet that is required by the prisoner's "religious" beliefs. Before reaching the underlying constitutional claim, a court must first determine (1) whether the "religious" beliefs are sincerely held, and (2) whether the prisoner's beliefs "constitute a religion [*268] within the meaning of the *First Amendment*." *Africa v. Pennsylvania, 662 F.2d 1025, 1029-31 (3d Cir. 1981)* (holding that a prisoner's belief system was not a religion for [**28] purposes of *First Amendment* analysis). Deciding whether a specific act or practice qualifies as "religious exercise" under RLUIPA arguably creates no greater entanglement than deciding whether a particular belief system constitutes a "religion" under the *First Amendment*. However, because we have concluded that RLUIPA has the impermissible effect of advancing religion, we have no need to further explore the question of whether RLUIPA violates *Lemon*'s entanglement prong.

C. The unpersuasive nature of the cases upholding RLUIPA and RFRA

The cases that have upheld RLUIPA and RFRA against constitutional attack have essentially relied on the rationale of *Amos*. *See, e.g.,Charles v. Verhagen, 2003 U.S. App. LEXIS 22297, No. 02-3572, slip op. at 12-13 (7th Cir. Oct. 30, 2003)*; *Mayweathers v. Newland, 314 F.3d 1062, 1068-69 (9th Cir. 2002)*. We believe that such reliance is misplaced. As we have already discussed, the exemption in *Amos* was arguably necessary to avoid an *Establishment Clause* violation. *Amos, 483 U.S. at 336*; *see also id. at 344* (Brennan, J., concurring). But RLUIPA extends protection to religious exercise in prison far beyond what is required [**29] by the *Establishment Clause*; it imposes strict scrutiny where the *Establishment Clause* requires only a rational-relationship review. *See Turner, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254*; *O'Lone, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400*. [***20]

The exemption in *Amos*, moreover, was a narrowly tailored solution to the potential *Establishment Clause* problem created by Title VII's application to religious institutions. RLUIPA, on the other hand, does not address a particular burden on religious exercise, but instead exempts religious prisoners from many generally applicable prison regulations. *See* Hamilton, *1 U. Pa. J. Const. L. at 13-14*. We believe that Professor Hamilton's comment that "comparing RFRA to *Amos* is like comparing apples to oranges" is equally applicable when comparing RLUIPA to *Amos*. *See id.* This same point was expressed somewhat differently in *Madison*:

The difference between *Amos* and RLUIPA is, like all *Establishment Clause* cases, a question of degree. However, the difference in degree between the two is substantial, and congressional neutrality is the line that divides [**30] them. [HN15] When Congress has acted to impose an affirmative burden on religion, it is necessary for Congress to remove that burden in order to retain a position of neutrality towards religious belief. However, when Congress acts to provide religious inmates, and only religious inmates, with a level of constitutional protection that the Supreme Court has deemed unnecessary to protect religious rights, it has gone beyond protecting religion to affirmatively advancing it.

240 F. Supp. 2d at 577 n.9; *see also Ghashiyah, 250 F. Supp. 2d at 1028-29* (noting the fundamental distinction between the exemption in *Amos* and RLUIPA).

These authorities have convinced us that reliance on the rationale of *Amos* to sustain the constitutionality of RLUIPA is misplaced. We therefore conclude that the cases supporting RLUIPA are unpersuasive. [***21]

III. CONCLUSION

For all the reasons set forth above, we hold [HN16] that *42 U.S.C. § 2000cc-1* violates the [*269] *Establishment Clause*. Because of this determination, we have no need to consider the alternative grounds raised by defendants in their constitutional challenge to RLUIPA. We therefore [**31] REVERSE the district court's denial of defendants' motions to dismiss and REMAND the case for further proceedings consistent with this opinion.

John W. Gerhardt, Plaintiff, v. Alan Lazaroff, et al., Defendants, and Lee Hampton, et al., Plaintiffs, v. Reginald Wilkinson, et al., Defendants, and John Miller, et al., Plaintiffs, v. Reginald Wilkinson, et al., Defendants.

Case No. C2-95-517, Case No. C2-97-382, Case No. C2-98-275

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

221 F. Supp. 2d 827; 2002 U.S. Dist. LEXIS 16205

February 25, 2002, Decided
February 25, 2002, Filed

PRIOR HISTORY: *Gerhardt v. Lazaroff, 2001 U.S. Dist. LEXIS 24489* (S.D. Ohio Aug. 27, 2001).

DISPOSITION: [**1] Objections to Magistrate Judge's Report and Recommendation overruled and Report and Recommendation adopted. Defendants' motion to dismiss denied with exception that plaintiffs' claims asserted directly under Ohio Constitution dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Three cases were consolidated for the purpose of issuing a single ruling on defendants' motion to dismiss. The sole issue raised by the motion was the constitutionality of the Religious Land Use and Institutionalized Persons Act, *42 U.S.C.S. § 2000cc* et seq. Each plaintiff alleged denial of the right to practice his religion in a prison setting. A magistrate judge recommended denial of the defendants' motion and defendants objected.

OVERVIEW: Defendants argued that a statute such as Religious Land Use and Institutionalized Persons Act, *42 U.S.C.S. § 2000cc* et seq., which imposes a least restrictive means test on the actions of prison officials is too vague to be enforceable in the prison setting. Since that was the test that Congress selected, as long as the statute was not unconstitutional, it was the court's duty to implement it. For the most part, defendants raised a facial challenge to RLUIPA's constitutionality, and had not contended that under the facts of any of the specific pending cases applying the RLUIPA would produce unconstitutional results. The United States, who had joined plaintiffs, demonstrated an adequate relationship between the purpose of the federal funds and the purposes of RLUIPA, and that the four-part Dole test had been satisfied. Defendants' argument that the RLUIPA constituted governmental endorsement of religion was rejected. The government's decision to lift burdens on the free exercise of religion was not tantamount to government endorsement of either a particular religion or religion in general.

OUTCOME: The objections to the magistrate judge's report and recommendation were overruled and the report and recommendation was adopted, and defendants' motion to dismiss was denied with the exception of plaintiffs' claims asserted directly under the Ohio Constitution, which were dismissed.

LexisNexis(R) Headnotes

Governments > Legislation > Interpretation
[HN1] When evaluating a facial challenge to a statute, a court must be careful not to allow the legislative findings underlying enactment of the statute to be trumped by the fact finding apparatus of a single court.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion
[HN2] The Religious Land Use and Institutionalized Persons Act, *42 U.S.C.S. § 2000cc* et seq., to enlarges rather than restricts the free exercise of religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN3] The government's decision to lift burdens on the free exercise of religion is not tantamount to government endorsement of either a particular religion or religion in general.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN4] Government action which operates to accommodate the exercise of religion is not tantamount, by itself, to an unconstitutional endorsement of religion.

Civil Procedure > Trials > Judicial Discretion
[HN5] It is a sound exercise of judicial discretion not to decide issues which are unnecessary to the outcome of the case.

COUNSEL: David Alan Goldberger, Ohio State University College of Law, Columbus, OH, for plaintiffs (C2-98-275).

Todd Robert Marti, Ohio Attorney General's Office, Columbus, OH, for defendants (C2-98-275).

JUDGES: Edmund A. Sargus Jr., United States District Judge. MAGISTRATE JUDGE KEMP. JUDGE GRAHAM.

OPINIONBY: Edmund A. Sargus Jr.

OPINION: [*829]

OPINION AND ORDER

These three cases, one pending before the undersigned Judge, one pending before Judge James L. Graham, and one pending before Magistrate Judge Terence P. Kemp, have been consolidated for the purpose of issuing a single ruling on defendants' motion to dismiss. The sole issue raised by the motion is the constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), *42 U.S.C. § § 2000cc* et seq.

In a Report and Recommendation filed on August 27, 2001, Magistrate Judge Kemp, to whom the motion had been referred for an initial decision pursuant to *28 U.S.C. § 636*(b), [**2] recommended that the defendants' motion be denied, with the exception of that portion directed to plaintiffs' claims under the Ohio Constitution. Defendants objected to that recommendation, continuing to argue that RLUIPA was not a constitutional exercise of Congress' power under either the Spending Clause or the Commerce Clause. All of the plaintiffs, including the United States, which intervened in order to defend the constitutionality of RLUIPA, filed responses to the objections, and the defendants filed a reply. For the following reasons, the objections will be overruled and defendants' motion for partial dismissal will be denied with the exception of that portion directed to plaintiffs' claims under the Ohio Constitution.

I.

The facts of this case are essentially those set forth in the Magistrate Judge's Report and Recommendation. Because, for the most part, defendants' challenge is a legal challenge and not dependent upon the facts of any particular case, a lengthy recitation of the facts is unnecessary. [*830] However, as more fully discussed below, there are certain facts which the defendants assert have been established for purposes of the Court's ruling and which, they claim, [**3] were overlooked or improperly disregarded by the Magistrate Judge. The Court will comment on those factual issues in the context of discussing the legal objections which defendants have raised.

Otherwise, the facts are relatively straightforward. Each of the plaintiffs claims to have been denied the right to practice his religion in the prison setting due to what plaintiffs assert are unwarranted concerns about security or unjustified assumptions about the relationship between plaintiffs' chosen religion and prison gang activity, primarily White Supremacy gangs. Although plaintiffs originally contended that their constitutional rights were being violated under the Turner v. Safley standard, see *Turner v. Safley, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*, after RLUIPA was enacted, they contended that the more restrictive standards set forth in that statute applied to the state's actions. The State of Ohio then sought a ruling from the court that RLUIPA is unconstitutional.

II.

Defendants challenged RLUIPA on grounds that its enactment exceeded Congress' powers under either the Spending Clause or the Commerce Clause of the United States Constitution. [**4] The Magistrate Judge determined that the Spending Power provided adequate support for the enactment of RLUIPA, and consequently did not reach the Commerce Clause issue. Defendants argued both that the Magistrate Judge's conclusions with respect to the Spending Clause are erroneous, and that the Magistrate Judge erred in refusing to reach the arguments relating to the Commerce Clause. For the following reasons, the Court finds each of defendants' objections to be without merit.

Defendants first argue that a statute such as RLUIPA which imposes a "least restrictive means" test on the actions of prison officials is too vague to be enforceable in the prison setting. Defendants argue that, although this test governs the actions of a state when dealing with private citizens' First Amendment concerns, it not only has the potential to lead to judicial second-guessing in the prison setting, but has, when applied in the past, produced judicial decisions diametrically opposed to each other, thus leaving prison officials without sufficient

guidance to determine how to implement RLUIPA's requirements.

The short answer to defendants' arguments is that any statute which contemplates judicial review [**5] under a standard which is not susceptible to mechanical and precise definition has the potential to lead to conflicting judicial decisions on similar sets of facts. This potential result is not fatal to the enforceability of the statute. The Court further believes that defendants' continued reliance on *Turner v. Safley, supra,* is unavailing. In Turner, the Supreme Court was interpreting a provision of the Constitution. In doing so, it weighed the constitutional rights of inmates against the realities of the prison setting. Although the Court did not conclude that the First Amendment required imposition of a "least restrictive means" test, Congress, in enacting RLUIPA, has decreed otherwise with respect to a narrow class of First Amendment claims. Once Congress makes that decision, it is the Court's duty to implement it unless the statute exceeds Congress' power or is otherwise unconstitutional. The fact that the Supreme Court did not impose such a high standard absent a congressional directive to do so is, by itself, not persuasive on the issue of whether Congress had the power to impose a higher standard if it so chose.

[*831] Defendants make several arguments which, [**6] they claim, should have been resolved by the Magistrate Judge on the basis of their "uncontroverted" affidavits. They contend that, as a factual matter, (1) there is an inadequate relationship between the federal funds provided and the purposes of RLUIPA; (2) that any such relationship is not proportional to the amount of federal funds utilized in the prison programs in Ohio; and (3) that the enforcement of RLUIPA in the prison setting will necessarily involve burdening other inmates by placing them at a greater risk of physical harm because RLUIPA will prevent prison officials from restricting activities of other prisoners which pose legitimate security threats. In response, plaintiffs argue primarily that these are all matters of "legislative" fact and that defendants in an individual case may not, by entering affidavits into the record, compel the Court to reach the conclusion that, for example, to enforce RLUIPA would necessarily burden other inmates. That is a judgment, according to plaintiffs, which Congress is free to make and which the Court may overturn only if it is irrational.

The Court agrees with plaintiffs on this issue. For the most part, defendants have raised a facial [**7] challenge to RLUIPA's constitutionality, and have not contended that under the facts of any of the specific cases pending before the Court, applying RLUIPA would produce unconstitutional results. [HN1] When evaluating a facial challenge to a statute, the Court must be careful not to allow the legislative findings underlying enactment of the statute to be "trumped by the fact finding apparatus of a single court." *Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1312 (4th Cir. 1995),* vacated on other grounds, *517 U.S. 1206 (1996),* reaffirmed *101 F.3d 325 (4th Cir. 1996),* cert. denied *520 U.S. 1204 (1997).* Beyond that fundamental point, however, the Court is persuaded that the United States has demonstrated an adequate relationship between the purpose of the federal funds and the purposes of RLUIPA, and that the four-part test set forth in *South Dakota v. Dole, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987)* has been satisfied here.

Defendants' reliance on *FCC v. League of Women Voters, 468 U.S. 364, 399-400, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984)* for its proportionality argument is [**8] also misplaced. Importantly, that case involved a Congressional enactment which, if validated, would have restricted the First Amendment free speech rights of the recipients of federal funds. In the context of a First Amendment challenge, the Court held that there must be a substantial relationship between the purpose of the funding and the interests sought to be advanced by the First Amendment restrictions. Otherwise, Congress could simply not "justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects." *Id. at 402.* By contrast, [HN2] Congress passed RLUIPA to enlarge rather than restrict the free exercise of religion, and the First Amendment concerns identified in League of Women Voters are not present here. Further, the radio stations at issue in that case were prohibited from spinning off affiliates to carry on the work which Congress had prohibited, so that it was impossible for them to carry out their free speech activities by segregating the Congressional funds from the entity which performed those activities.

As the plaintiffs contend, the state has, among other things, the recourse simply to choose not [**9] to accept federal funding. If the funding is, as defendants assert, a de minimis portion of the state prison budget, then Ohio has more incentive to forego federal funding of its prisons. Should it do so, the State would not be subject to [*832] RLUIPA under a Spending Clause theory. Since Ohio has continued to accept federal funds after RLUIPA's enactment, however, it has clearly not chosen this alternative.

Defendant's other primary argument is that RLUIPA constitutes governmental endorsement of religion. The Court adopts the Report and Recommendation's conclusion that [HN3] the government's decision to lift burdens on the free exercise of religion is not tantamount to government endorsement of either a particular religion or religion in general. The Supreme Court has specifically upheld government enactments in the free exercise area which allow religion to be exercised in a manner which

the First Amendment does not compel, and those enactments have been upheld as a valid exercise of Congress' power in this area. [HN4] Government action which operates to accommodate the exercise of religion is not tantamount, by itself, to an unconstitutional endorsement of religion. *Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, 483 U.S. 327, 337, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987).* [**10]

Finally, the Court agrees with the Magistrate Judge that there was no need to reach the Commerce Clause issue in this case. [HN5] It is a sound exercise of judicial discretion not to decide issues which are unnecessary to the outcome of the case. Because RLUIPA can be sustained on either of the two grounds advanced by the plaintiffs and the Court has found one of those grounds to be sufficient, any decision on the Commerce Clause issue would be an advisory opinion. Although the possibility exists that the Court of Appeals would disagree with this Court's analysis of the Spending Clause issue and might therefore be required to reach the Commerce Clause argument, that is not a justification for deciding a difficult constitutional issue when that decision is unnecessary to permit the case to proceed.

III.

Based upon the foregoing, the objections to the Magistrate Judge's Report and Recommendation are OVERRULED and the Report and Recommendation is ADOPTED. The defendants' motion to dismiss is DENIED with the exception that plaintiffs' claims asserted directly under the Ohio Constitution are DISMISSED. Case No. C-2-97-382 is returned to Judge Graham for further proceedings. Case No. C-2-95-517 will, [**11] unless objections are filed within ten days, be returned to Magistrate Judge Kemp for further proceedings on the assumption that the only issue which the non-consenting party, the United States, intended to argue was the constitutionality of RLUIPA, and that the parties do not have further objections to that case proceeding to adjudication on the merits before Magistrate Judge Kemp.

2-25-2002

Edmund A. Sargus Jr.

United States District Judge

John W. Gerhardt, Plaintiff, v. Alan Lazaroff, et al., Defendants, and Lee Hampton, et al., Plaintiffs, v. Reginald Wilkinson, et al., Defendants, and John Miller, et al., Plaintiffs, v. Reginald Wilkinson, et al., Defendants.

Case No. C2-95-517, Case No. C2-97-382, Case No. C2-98-275

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

221 F. Supp. 2d 827; 2001 U.S. Dist. LEXIS 24489

August 27, 2001, Decided
August 27, 2001, Filed

SUBSEQUENT HISTORY: adopted, objection overruled, dismissed, in part, *Gerhardt v. Lazaroff, 2002 U.S. Dist. LEXIS 16205* (S.D. Ohio Feb. 25, 2002) Reported at: *221 F. Supp. 2d 827 at 832.*

DISPOSITION: [**1] Recommended that motions to dismiss plaintiffs' RLUIPA claims be denied.

CASE SUMMARY:

PROCEDURAL POSTURE: In consolidated cases, plaintiff state prisoners sued defendant prison officials, alleging, inter alia, that the state prison's practices regarding the prisoners' religious practices violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), *42 U.S.C.S. § 2000cc* et seq. The prison officials moved to dismiss the RLUIPA claim. The matter was referred to a magistrate for a report and recommendation.

OVERVIEW: The RLUIPA was a proper exercise of congressional spending power as it furthered the general welfare and adequately expressed an intent to condition further payment of federal funds to state prison programs upon the states' compliance with RLUIPA. The relationship between federal funds received by the state prison and the prisoners' religious practices was sufficiently direct to insulate the RLUIPA from a constitutional challenge based on funding relationships given the discretion granted Congress to determine the need to enact specific legislation to further the general welfare and the precept that otherwise properly enacted legislation was struck down only if it clearly exceeded constitutional limits on U.S. Const. art. I power. The RLUIPA did not violate the Establishment Clause as it specifically permitted safety and security to outweigh claims for religious accommodation. The Act did not violate the state's Tenth Amendment rights as Congress acted constitutionally under the Spending Clause in enacting the RLUIPA. The Act did not violate the Eleventh Amendment because by accepting federal funds, the state acquiesced to enforcement under *42 U.S.C.S. § 2000cc-5*(4)(A).

OUTCOME: The magistrate recommended that the court find the Religious Land Use and Institutionalized Persons Act of 2000, to be a constitutional exercise of congressional spending power and that neither the Tenth Amendment nor the Eleventh Amendment provided the prison officials with immunity from the Act's provisions. Consequently, the magistrate recommended that the motion to dismiss be denied.

LexisNexis(R) Headnotes

Governments > Legislation > Enactment
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation
[HN1] It follows from the constitutionally-mandated division of authority among the three branches of the federal government, as well as from the division of governmental power between the federal government and the states, that Congressional acts are valid only when effectuated through one or more specifically enumerated constitutional powers. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the United States Constitution is written. However, an act of Congress is presumptively constitutional and should only be invalidated when it is clear Congress exceeded its enumerated powers in passing such legislation.

Constitutional Law > Congressional Duties & Powers > Commerce Clause
[HN2] Congress may constitutionally regulate three main areas or activities of commerce. First, Congress may regulate the channels of interstate commerce. Second, Congress may regulate to protect the instrumentalities of interstate commerce, or persons or things involved in interstate commerce, even though the threat being regulated against arises from intrastate activities. Finally, Congress may regulate activities which have a substantial effect on interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause
[HN3] In order for a statute constitutionally to regulate activities which have a substantial effect on interstate commerce, one of three prerequisites must be satisfied: (1) the relationship between the regulated activities and interstate commerce must be readily apparent; (2) Congress must have made specific and supportable factual findings concerning that relationship; or (3) the statute must place the burden on the party seeking enforcement to allege and demonstrate that relationship.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN4] The United States Constitution explicitly empowers Congress to provide for the general welfare of the United States. U.S. Const. art. I, § 8, cl. 1. Congress may expend funds in areas or enterprises even though its constitutional power to legislate that area or enterprise may be limited: the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the United States Constitution. In making such expenditures, however, Congress may constitutionally condition receipt of federal funds upon compliance by the recipient with federal statutory and administrative directives by the states to further broad policy objectives Congress might not otherwise be able to effect through direct legislation. Despite this broad assertion, Congress' spending power has never has never been viewed as unlimited. There are four broad constitutional circumscriptions of the spending power.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN5] The first limitation on the spending power of Congress is derived from the language of the spending clause itself. U.S. Const., art. I, § 8, cl. 1. An exercise of the spending power is permissible only when it is in the pursuit of the general welfare of the United States. The second limitation requires that any conditions on the federal grant be clearly presented to the states for their acceptance or rejection along with the grant itself. The third requirement is that the conditions on the federal grant be related to the federal interest involved in the various national projects or programs. The last requirement is that Congress's exercise of its spending power not violate any other constitutional provision.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN6] A determination of what constitutes the general welfare of the citizens under U.S. Const. art. I, § 8, cl. 1, is left to Congress's discretion unless the choice is clearly wrong or a display of arbitrary power rather than an exercise of judgment. The concept of the general welfare is not static, and needs that were narrow or parochial a century ago may be interwoven in the present day with the well-being of the nation.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN7] According to a magistrate of the United States District Court for the Southern District of Ohio, Eastern Division, the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., is sufficiently related to the general welfare of the United States to survive a constitutional challenge on that ground. U.S. Const. art. I, § 8, cl. 1.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN8] The second requirement of the spending power under U.S. Const. art. I, § 8, cl. 1, actually encompasses the consideration of two interrelated constitutional concerns. First, any condition imposed by Congress on the receipt of federal funds must be unambiguous so that states may exercise their choice knowingly, cognizant of the consequences of their participation. Thus, a state must be able to ascertain what is expected of it by the language of the statute. Consequently, the conditions must be articulated in a way that allows a state to be certain of the consequences of its obligation to enforce the requirement. Second, such conditions may not be imposed on the states after the funds have been received. Though Congress's power to legislate under the spending power is broad, it does not include surprising participating states with post acceptance or retroactive conditions.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN9] According to a magistrate for the United States District Court for the Southern District of Ohio, Eastern Division, the term "shall" is quintessentially a word as-

sociated with obligations and rights for purposes of cases challenging a statute under U.S. Const. art. I, § 8, cl. 1.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN10] A magistrate for the United States District Court for the Southern District of Ohio, Eastern Division, holds that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), *42 U.S.C.S. § 2000cc* et seq., adequately expresses Congress's intent to condition further payment of federal funds to state prison programs upon the states' compliance with RLUIPA for purposes of U.S. Const. art. I, § 8, cl. 1.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN11] A magistrate for the United States District Court for the Southern District of Ohio, Eastern Division, concludes that the strict scrutiny standard set forth in the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., is not so vague for purposes of U.S. Const. art. I, § 8, cl. 1, that states cannot reasonably appreciate the obligations they are choosing to undertake by continuing to accept federal money for prison programs.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN12] Given the discretion granted to Congress to determine, in the first instance, the need to enact specific legislation to further the general welfare, and the precept that courts may strike down otherwise properly-enacted federal legislation only if it clearly exceeds constitutional limits on the U.S. Const. art. I power, a magistrate of the United States District Court for the Southern District of Ohio, Eastern Division, concludes that the relationship between federal funds received by a state prison and the religious practices of inmates confined in institutions under the jurisdiction of the state prison is sufficiently direct to insulate the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., from this particular constitutional challenge.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN13] A magistrate of the United States District Court for the Southern District of Ohio, Eastern Division, concludes that the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., does not violate the First Amendment's Establishment Clause.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN14] The Establishment Clause of the United States Constitution provides that Congress shall make no law respecting an establishment of religion. U.S. Const. amend. I. The Lemon test remains the current standard by which to determine whether a statute violates the Establishment Clause. To pass constitutional muster, the statute in question (1) must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) the statute must not foster an excessive government entanglement with religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN15] Governments may, in their effort to accommodate religion, go beyond what is minimally required of them by the Free Exercise Clause without running afoul of the Establishment Clause. The government is permitted, under the Lemon test, to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions so long as the government does not abandon neutrality and act with the intent of promoting a particular point of view in religious matters. The notion that any law which makes it easier for a religion to carry out its mission is unconstitutional is rejected since religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster, such as laws which provide tax exemptions to religious organizations or which permit school supplies to be loaned to students attending parochial schools. What is prohibited is the government itself advancing religion through its own activities and influence. Finally, the notion that a law which singles out religions for the benefit it confers is per se unconstitutional is rejected. Where the government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, there is no reason to require that the exemption come packaged with benefits to secular entities.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
[HN16] The Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., specifically permits safety and security, which are undisputedly compelling state interests, to outweigh an inmate's claim to a religious accommodation so long as there is a sufficient nexus between that interest and the denial of the requested accommodation, and there is no reasonable alternative to denial that would accommodate both the free exercise of religion and the need to maintain order in the prison environment.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN17] According to a magistrate of the United States District Court for the Southern District of Ohio, Eastern Division, at a minimum, the constitutional infirmity of a statute under the Establishment Clause flows from consequences that are evident or on the face of the statute and which, due to the absolute nature of the statute's requirements, cannot be avoided by any amount of statutory interpretation. Where it is an open question as to the extent of the burdens (if any) the statute will necessarily place on third parties and where the courts will be given the chance to interpret the statute's requirements in order to avoid placing unconstitutional burdens on others in order to accommodate the free exercise of religion, the statute will withstand an Establishment Clause challenge.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN18] The potential loss of less than one percent of the funding by the states does not cross the generalized line established by prior cases and turn enticement into compulsion for purposes of U.S. Const. art. I, § 8, cl. 1.

Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN19] See U.S. Const. amend. X.

Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN20] The Tenth Amendment has long been interpreted to ensure that the federal government remains one of limited powers, determining what powers in fact have been given to it by the people.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN21] The Tenth Amendment stands as no independent constitutional bar to legislation that is a constitutional exercise of the spending power.

Constitutional Law > State Autonomy
[HN22] The scope of the state's sovereign immunity neither derives from nor is limited by the terms of the Eleventh Amendment. The United States Constitution does not give Congress the power to waive a state's sovereign immunity from suit in its own courts.

Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN23] The determination of whether a particular statute violates the Tenth Amendment is necessarily a determination of whether Congress was within its enumerated powers in passing the contested legislation. Congress exercises its conferred powers subject to the limitations contained in the United States Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the federal government is subject to limits that may, in a given instance, reserve power to the states. The Tenth Amendment thus directs the court to determine whether an incident of state sovereignty is protected by a limitation on a U.S. Const. art. I power.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN24] According to a magistrate for the United States District Court for the Southern District of Ohio, Eastern Division, because Congress acted constitutionally under the Spending Clause in passing the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., the states' Tenth Amendment rights necessarily have not been violated.

Constitutional Law > State Autonomy
[HN25] The Eleventh Amendment provides that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. U.S. Const. amend. XI.

Constitutional Law > State Autonomy
[HN26] Although the text of the Eleventh Amendment creates no immunity against citizens attempting to sue their own state, it has long been settled that the Amendment, representing the concept of states as co-equal sovereigns with the federal system bars such suits. Furthermore, suits which raise civil claims against state officials for actions committed while serving in their official capacity but are, in essence, a claim against the state are barred by the Eleventh Amendment.

Constitutional Law > State Autonomy

[HN27] Although Congress has the power to abrogate a state's Eleventh Amendment immunity pursuant to U.S. Const. amend. XIV, § 5, Congress may not abrogate state sovereign immunity under any of its U.S. Const. art. I powers.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

[HN28] Congress may, in the exercise of its spending power, condition the grant of funds to the states upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Constitutional Law > State Autonomy

[HN29] For purposes of the Eleventh Amendment, a state's acceptance of the terms pursuant to the Spending Clause necessarily establishes its acquiescence to § 2(a) of the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., which provides that a person may assert a violation of the Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government, where the term government includes a state, its departments, or its officials. *42 U.S.C.S. § 2000cc-5*(4)(A).

Constitutional Law > State Autonomy

[HN30] The Ex parte Young doctrine remains good law in providing that plaintiffs may bring a suit against a state official seeking prospective injunctive or declaratory relief to conform their behavior to comply with federal law without running afoul of the Eleventh Amendment.

Constitutional Law > State Autonomy

[HN31] The Eleventh Amendment clearly does not now prohibit prisoners from utilizing the Ex parte Young doctrine to obtain accommodations for their religious practices.

COUNSEL: For plaintiffs (C2-98-275): David Alan Goldberger, Ohio State University College of Law, Columbus, OH.

For defendants (C2-98-275): Todd Robert Marti, Ohio Attorney General's Office, Columbus, OH.

JUDGES: Terence P. Kemp, United States Magistrate Judge. JUDGE GRAHAM. MAGISTRATE JUDGE ABEL. JUDGE SARGUS.

OPINIONBY: Terence P. Kemp

OPINION:

[*832] REPORT AND RECOMMENDATION

Plaintiffs in these consolidated cases are Ohio prisoners who desire to practice a religion not traditionally recognized by the Ohio Department of Rehabilitation and Corrections ("ODRC"). All plaintiffs advance similar claims that ODRC staff have interfered with the practice of their respective religions or that staff have subjected them to illegal or unconstitutional treatment because they attempted to assert their religious beliefs. These allegations include: (1) denial of access to religious literature and/ or items necessary to practice their religion; (2) denial of the opportunity to conduct religious services; (3) denial of the freedom to conform their dress or appearance to that required by [*833] their religion; (4) denial of a prison chaplain specifically [**2] trained in and dedicated to their religion; and (5) retaliation and discrimination by ODRC staff resulting from attempts to advance and practice their religion. All have amended their complaints to assert that ODRC's practices violate the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), *42 U.S.C. § § 2000cc* et seq.

The defendants have moved to dismiss the RLUIPA claims, arguing that the statute may not be constitutionally applied to the States. The United States has intervened to defend the constitutionality of RLUIPA. Although the motions to dismiss filed in cases C-2-95-517 and C-2-98-275 were originally to have been decided by the undersigned in a final decision, as authorized by *28 U.S.C. § 636*(c), the United States did not consent to that disposition. Thus, this Report and Recommendation is being issued pursuant to *28 U.S.C. § 636*(b)(1)(B) and Eastern Division Order 95-2. For the following reasons, it will be recommended that the motions to dismiss plaintiffs' RLUIPA claims be denied.

I.

Although the defendants styled their motion as one to dismiss, both they and the plaintiffs [**3] have submitted evidentiary materials outside the pleadings. There are disputes about the admissibility of some of this material. The Court's dispostion of the motion is not primarily fact-based, and it moots the parties' dispute about evidentiary materials. The Court will set forth only those facts necessary to put the legal issues into context. Most, if not all, of the facts recited below are not disputed and many have been stipulated.

A. Current Plaintiffs and Ohio's Experience Under RFRA

In Gerhardt, Case No. C2-95-517, the plaintiff is a member and ordained minister of the Church of Jesus Christ Christian ("CJCC"), a subdenomination of the Christian Identity movement. This church espouses theory contrary to more traditional Christian dogma, including a belief that the races should be separated, and seeks to advance these beliefs through the Aryan Nation, the church's political division. In Miller, Case No. C2-98-275, members of the plaintiff class are followers of the Asatru religion, also known as Odinism, Vor Tru, or Troth. This polytheistic religion of Northern Europe originated with the Vikings and includes Thor, the Norse God of Thunder, among its pantheon of [**4] gods. Finally, in Hampton, Case No. C2-97-382, plaintiff J. Lee Hampton is a member of the Wiccan religion and a practicing "witch," while plaintiff Jon B. Cutter is an avowed Satanist. For purposes of the instant motion, defendants concede that these are *bona fide* religions and that the plaintiffs do genuinely hold these beliefs. It is also undisputed that the defendants have refused to grant some or all of the religious requests made by the plaintiffs.

The defendants assert that the denial of many of the plaintiffs' requests was justified because the practices and/ or articles in question pose a security risk to the institution, either by advancing inflammatory practices or ideologies tending to incite violence or by sheltering otherwise illicit gang activity. For example, defendants claim that the practice of Asatru has been tied to the 1993 riot at the Southern Ohio Correctional Facility, as well as various murders, escapes, or attempted escapes at the Madison, Trumbull, Lebanon, and Mansfield Correctional Institutions. Similarly, the defendants contend that the CJCC is affiliated with the Aryan Brotherhood, a group allegedly involved in criminal activity and violence [**5] within the Ohio prison system. Both groups are allegedly linked to white supremacist activities and violent crime in the public at large. Plaintiffs, [*834] however, deny that their respective religions are involved with any violent activity, condone or espouse any act of violence, or pose any security threat to the various correctional institutions of the Ohio prison system. Although both parties discuss these issues in their memoranda, the Court is not required to determine, in the context of the pending motions to dismiss, the relationship, if any, between plaintiffs' religious beliefs and prison security. Rather, the issue is whether defendants must meet RLUIPA's higher standard of justifying security-based restrictions on religion, or only the lower pre-RLUIPA standard.

The defendants also detail the allegedly onerous effects that Congress' last effort to legislate a higher standard of scrutiny to evaluate prisons' efforts to regulate inmates' religious practices - the Religious Freedom Restoration Act, or RFRA - imposed upon ODRC operations and staff before its application to the States was declared unconstitutional in *Boerne v. Flores, 521 U.S. 507 (1993)*. According [**6] to defendants, the number of religions espoused by Ohio prisoners proliferated under RFRA, and the religions in question often demanded distinctly unorthodox religious services and items, such as martial arts classes. Furthermore, a considerable amount of state resources were consumed addressing prisoner litigation efforts. According to defendants, ODRC religious administrators were spending between 75 and 90 percent of their time addressing RFRA litigation and operational issues, forcing them to neglect their other religious duties. In one case alone, ODRC and Ohio Department of Youth Services employees spent more than 125 hours in connection with depositions and more than 900 hours responding to over 300 separate document requests. More than 70 cases involving RFRA were active during this same time period. The significance, if any, of these matters to the constitutionality of RLUIPA will be addressed below.

B. History and Enactment of RLUIPA

In 1993, in response to the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*, Congress enacted the Religious Freedom Restoration [**7] Act ("RFRA"), *42 U.S.C. 2000bb* et seq. pursuant to either its Enforcement Power or Preventive Power under § 5 of the Fourteenth Amendment. In Smith, the Supreme Court held that a law of general applicability, such as Oregon's law precluding employees who were terminated for "good cause" from receiving unemployment benefits, need not be supported by a "compelling state interest" in order to pass constitutional muster. RFRA outlawed governmental attempts to "substantially burden" any person's exercise of religion, "even if the burden results from a rule of general applicability," unless the law furthered a compelling state interest and was the least restrictive means of furthering that interest. The Supreme Court, however, held in Boerne that this legislative attempt by Congress exceeded its power to legislate under Section 5 of the Fourteenth Amendment, and that the statute was therefore unconstitutional as applied to the States. *Boerne, 521 U.S. at 536.*

Congress subsequently attempted to enact similar or identical statutes pursuant to other enumerated powers. The first bills, S. 2148 and H.R. 4019 (105th Congress) (entitled the [**8] Religious Liberty Protection Acts), apparently died of neglect during the Clinton impeachment proceedings and failed to move out of committee in either House of Congress. The 1999 versions, S. 2081 and H.R. 1691 (106th Congress), passed the House but failed to clear the Senate, drawing substantial opposition [*835] from various civil rights groups who feared the proposed legislation would undermine various anti-discrimination laws.

The following year, after considering testimony about the difficulties that various institutionalized individuals experienced in practicing their faith, the Senate passed a bill limiting the applicability of the proposed legislation to state actions affecting land use and the institutionalized. As it relates to institutionalized persons, the Act contains a textual provision virtually identical to RFRA, but premises its authority on the spending and commerce powers entrusted to Congress under the Constitution. Thus, it prohibits governments from imposing, for any but compelling reasons, substantial burdens on the religious exercise of institutionalized persons if those burdens are "imposed in a program or activity that receives Federal financial assistance, or [**9] if the burden affects interstate or foreign commerce or commerce with Indian tribes." *42 U.S.C. § 2000cc-1*(b). Furthermore, although it provides judicial remedies for unnecessary restrictions on religious liberty, Congress specifically noted that it expected the federal courts, when considering potential claims of the institutionalized, to "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with consideration of costs and limited resources." Joint Statement, 146 Cong. Rec. at S7775. Senate Bill S. 2869 (106th Congress) was not considered by committee but was passed on July 27, 2000 after only 47 minutes of debate. It was transmitted to the House that same evening and was passed, again without committee consideration, 16 minutes later. With President Clinton's signature, the bill became law effective September 22, 2000 and is codified at *42 U.S.C. § 2000cc* et seq.

C. ODRC Funding and Operations

Because RLUIPA was passed by Congress as an exercise [**10] of its Commerce and/ or Spending Power, the parties have submitted evidence relating to (1) the degree to which the ODRC receives federal financial support and the source of any such funds, and (2) the extent to which the ODRC conducts activities which may be construed to constitute interstate commerce. See Joint Stipulation, C2-97-382 File doc # 93, C2-95-517 File doc. # 106. The Joint Stipulation has been supplemented by a subsequent affidavit filed by Horst Gienapp, Grants Administrator for the ODRC. (C2-98-275 File doc. # 190). The pertinent facts are as follows.

1. Federal Funding of ODRC

Congress regularly provides grants to the ODRC to achieve a number of different objectives, either as direct grants from a federal agency to the ODRC or as federal funds generally allocated to other Ohio departments which are subsequently transferred to the ODRC. The purpose of any given grant is usually gleaned from one of two sources: the Catalog of Federal Domestic Assistance, jointly published by the United States General Services Administration, the Executive Office of the President, and the Office of Management and Budget, or by an individualized statement accompanying the grant [**11] articulating what aspect of ODRC operations the particular federal agency is intending to fund. As of September 22, 2000, the effective date of RLUIPA, the ODRC apparently had received 22 different federal grants. Second Affidavit of Horst Gienapp at 2.

Of these 22 grants, some are directed to support generalized construction, research, and operational efforts of the ODRC and, as a result, are not given or expended directly to fund specific prison inmate programs. Two of the largest of such grants are the Violent Offender Incarceration and [*836] Truth In Sentencing Incentive Grants ("VOI/ TIS") and the State Criminal Alien Assistance Program ("SCAAP"). The former, provided by the United States Department of Justice, is intended to provide states with funds to build or expand violent offender confinement capacity. Ohio has received approximately $ 69,000,000 over the last three years under the program; over $ 12,000,000 was applied for and awarded for the current year but has not yet been received. The latter program reimburses the ODRC for costs it incurs to incarcerate aliens convicted of felonies in Ohio. Under this program, Ohio traditionally receives an annual award of approximately [**12] $ 1,000,000. It received $ 1,300,000 last year. The most recent application for funds under this program is still pending. Similar federal funding efforts are intended to create and maintain support programs for ODRC staff, such as stress management programs. A second broad category of federal grants are specifically allocated to support prisoner education, vocational training and assistance, and drug treatment programs. A third and final broad category of grants go directly to support prisoner subsistence. These include monthly grants under the Federal School Breakfast Program and the Federal School Lunch Program, currently totaling more than $ 1,200,000.

Federal grant programs generally require the ODRC to submit applications for these various grants. This procedure, pending Congressional continuation of the programs and approval of the ODRC's request, involves a delay between request for and receipt of the relevant funds. Although the ODRC made applications for and was awarded federal grants after September 22, 2000, as of the date of the stipulation it had not received any funds pursuant to applications made after RLUIPA's effective date. The ODRC, however, expects to continue [**13] to apply for funds under these programs and, assuming continued Congressional support, expects to receive such funds. It may have done so by the date of this Report and Recommendation.

2. ODRC's Relationship with Interstate Commerce

The ODRC has established business agreements and regularly conducts transactions in intrastate and interstate commerce. The ODRC operates a program entitled Ohio Prison Industries ("OPI") in which inmates produce goods and services, some of which are sold to buyers outside the ODRC. Often using raw materials produced outside of Ohio, Ohio inmates produce products such as shoes, beds, furniture, and mulch for the state of Ohio. Although the state agencies generally pay the ODRC for these goods, they do so at a cost allowing the state to recognize substantial savings. For example, Ohio achieves savings of approximately $ 1,000,000 annually by purchasing highway safety reflectors produced and/ or recycled by OPI. The ODRC also sells some of these products to departments of corrections in other states. The ODRC has provided computer data-entry services to Unibase, a Utah Corporation, under a program maintained since 1987. Approximately 80 to 100 inmates [**14] at the Lebanon Correctional Institution and 50 inmates at the London Correctional Institution currently participate in the program. An additional 50 inmates at the Ohio Reformatory for Women are expected to enter the program shortly. Inmates also provide various services to Ohio departments, such as attaching snowplows and salt spreaders to state vehicles, and the ODRC is paid for these services.

Like any institution, the ODRC engages in commerce by acquiring the goods and services it requires to operate. Although each ODRC institution is largely responsible for its own purchasing, [*837] some expenditures in interstate commerce may be generalized among the state's correctional facilities. For example, Orient Correctional Institution's ("OCI") regular purchase of computers and motor vehicles, including two such vehicles last year, is representative of purchasing at the other institutions. Although OCI and Pickaway Correctional Institution ("PCI"), as the location of Frasier Medical Center, incur somewhat disproportionate medical expenses (amounting to approximately $ 2,000,000 annually, with an additional $ 20,000 to $ 60,000 spent monthly on mental health medications), all of the ODRC's [**15] facilities purchase a substantial amount of medical supplies and pharmaceuticals in interstate commerce. Ameritech and Quest, both non-Ohio companies, are paid approximately $ 1,800 and $ 500 per month, respectively, for providing ODRC facilities with local and long-distance telephone service. ODRC also enjoys an exclusive contract with MCI, an interstate corporation, by which it receives a percentage of the revenue attributable to the collect calls placed by the prison population to locations inside and outside of Ohio. The ODRC also engages outside corporations to manage Ohio prisons. Management and Training Corporation, a Utah corporation, is paid a per diem of $ 36.40 to operate the 1380 beds at the Lake Erie Correctional Institution in Conneaut, while CiviGenics Corporation, a Massachusetts corporation, is paid $ 55.39 a day to operate the 552 beds at the North Coast Correctional Treatment Facility in Grafton. No plaintiff in the instant action, however, has been incarcerated at either of those two facilities.

Finally, the ODRC enjoys interstate relationships and engagements providing for the housing and subsequent evaluation of its prison population. Ohio is a member of an interstate [**16] corrections compact, pursuant to *O.R.C. § 5120.50*, which provides for agreements between Ohio and twenty other states to exchange and house prisoners on a reciprocal basis, and Ohio currently houses and exchanges prisoners under the program. A similar agreement with the Federal Board of Prisons currently provides for reciprocal housing of state and federal prisoners, and prisoners are currently incarcerated under this program. Finally, Ohio enjoys cooperative arrangements with other states involving the evaluation and monitoring of prisoners currently released on probation or parole, and thousands of such individuals are involved in these programs annually. The plaintiffs do not contend that these compacts and agreements substantially burden their ability to exercise their religion.

II.

One of plaintiffs' claims is that ODRC's actions violate the Ohio Constitution. Defendants have moved to dismiss these claims on Eleventh Amendment grounds and under *O.R.C. § 9.86*. Plaintiffs' memorandum does not offer any response to these arguments. Because it appears that plaintiffs do not oppose the dismissal of their Ohio constitutional claims, it will be recommended that defendants' motion [**17] be granted as to these claims.

III.

A. Introduction

After the parties fully briefed the constitutionality of RLUIPA as an issue of first impression, the United States District Court for the Eastern District of California, in *Mayweathers v. Terhune, 2001 U.S. Dist. LEXIS 22300, 2001 WL 804140* (July 2, 2001), rejected the same constitutional challenges raised by the defendants here. This Court is in full agreement with the result reached in Mayweathers, at least to the extent that it addresses the same issues decided in this Report and Recommendation, but because these issues have not been addressed by [*838] any other courts, this Court's analysis of the Spending Clause issue will be somewhat more detailed.

Additionally, plaintiffs have raised an issue about the ripeness of the defendants' motion. They argue that

the issue of RLUIPA's constitutionality is not ripe for decision because if defendants can demonstrate "that the plaintiffs' religious claims are merely a 'cover' for gang activities, ... this Court can decide this case on non-statutory and non-constitutional grounds." Plaintiffs' Joint Reply, at 12.

Apparently, plaintiffs' position is that if a claim asserted in a complaint may [**18] eventually turn out to be factually unsupported, the Court should defer a decision on the legal sufficiency of the claim until the facts can be evaluated either through a summary judgment motion or at trial. To do so would be to deprive a defendant of the right to have a claim's legal sufficiency tested by way of a motion to dismiss, and would force a defendant to litigate the claim even if the facts alleged by the plaintiff would not support recovery. That is why *Fed.R.Civ.P. 12(b)(6)* allows motions to dismiss, and also why plaintiffs have not advanced a valid reason to delay a decision on defendants' motion.

B. General Principles

Envisioning a government where the legislature would be but one of three co-equal branches, the Framers established limits on congressional legislative power "in order to ensure protection of our fundamental liberties." *Gregory v. Ashcroft, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)* (quoting *Atascadero State Hospital v. Scanlon, 473 U.S. 234, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)* (internal quotation marks omitted)). [HN1] It follows from the constitutionally-mandated division of authority among [**19] the three branches of the federal government, as well as from the division of governmental power between the federal government and the states, that Congressional acts are valid only when effectuated through one or more specifically enumerated Constitutional powers. "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)*. However, an act of Congress is presumptively constitutional and should only be invalidated when it is clear Congress exceeded its enumerated powers in passing such legislation. *United States v. Morrison, 529 U.S. 598, 607, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000); United States v. Harris, 106 U.S. 629, 635, 27 L. Ed. 290, 1 S. Ct. 601, 4 Ky. L. Rptr. 739 (1883)*. The Court must therefore determine whether Congress exceeded its Commerce Clause and/ or Spending Clause powers in enacting RLUIPA.

C. Commerce Clause

Congress asserted that it enacted RLUIPA pursuant to its Commerce Clause power, see *42 U.S.C. § 2000cc-1*(b)(2), and plaintiffs contend that [**20] such effort was constitutional. Defendants, however, contend that the statute, as written and as applied to the ODRC's regulation of inmates' religious exercise, exceeds Congress's powers under the Commerce Clause.

The Commerce Clause issue in this case is fairly narrow. [HN2] Congress may constitutionally regulate three main areas or activities of "commerce." First, Congress may regulate the channels of interstate commerce. See *United States v. Lopez, 514 U.S. 549, 558, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256-257, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1965)*. Second, Congress may regulate to protect the instrumentalities of interstate commerce, or persons or things involved in interstate commerce, even though the threat being regulated against arises from [*839] intrastate activities. *Lopez, 514 U.S. at 558; Perez v. United States, 402 U.S. 146, 150, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)*. Finally, Congress may regulate activities which have a "substantial effect" on interstate commerce. *Lopez, 514 U.S. at 558-559; Morrison, 529 U.S. at 608-609*. [**21] Plaintiffs concede that Congress enacted RLUIPA as an example of this last class of activities, seeking to remove substantial burdens on religious practices by prisoners which "affect" commerce. *42 U.S.C. § 2000cc-1*(b)(2).

[HN3] In order for a statute constitutionally to regulate activities which have a substantial effect on interstate commerce, one of three prerequisites must be satisfied: (1) the relationship between the regulated activities and interstate commerce must be readily apparent; (2) Congress must have made specific and supportable factual findings concerning that relationship; or (3) the statute must place the burden on the party seeking enforcement to allege and demonstrate that relationship. See *Lopez, supra; Harrison, supra;* see also *United States v. Riddle, 249 F.3d 529, 536 (6th Cir. 2001)*. The parties' briefs focus on the third prerequisite, and raise issues both about the sufficiency of the statutory language and the likelihood that ODRC's limitations on inmates' religious exercise could ever be shown to have a substantial effect on interstate commerce.

Congress also enacted RLUIPA pursuant to its [**22] authority under the Spending Clause. In the Court's view, the Commerce Clause issues are the more difficult, requiring substantial construction of the statutory language and raising serious questions about the relationship between the internal operation of state prisons and interstate commerce. Because RLUIPA can be found to be constitutional if it was a valid exercise of Congress' authority under either the Spending Clause *or* the Commerce Clause, the undersigned will forego further discussion of the Commerce Clause as being unnecessary to the Court's resolution of defendants' motion to dismiss.

D. Spending Clause

[HN4] The Constitution also explicitly empowers Congress to "provide for the ... general Welfare of the United States." U.S. CONST. Art. I, § 8, cl. 1. The Supreme Court has long made clear that Congress may expend funds in areas or enterprises even though its constitutional power to legislate that area or enterprise may be limited: "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *United States v. Butler, 297 U.S. 1, 66, 80 L. Ed. 477, 56 S. Ct. 312, 4 Ohio Op. 401 (1936)*. [**23] In making such expenditures, however, Congress may constitutionally condition receipt of federal funds "upon compliance by the recipient with federal statutory and administrative directives" by the states "to further broad policy objectives" Congress might not otherwise be able to effect through direct legislation. *Fullilove v. Klutznick, 448 U.S. 448, 474, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)*(Burger, C.J.); see also *South Dakota v. Dole, 483 U.S. 203, 206-207, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16-17, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)*. Despite this broad assertion, Congress' spending power has never has never been viewed as unlimited. The Supreme Court has identified four broad constitutional circumscriptions of the spending power. See, e.g., *Dole, 483 U.S. at 207; Pennhurst, 451 U.S. at 17*.

[HN5] The first limitation on this power is derived from the language of the spending clause itself. See U.S. CONST., Art. I, § 8, cl. 1. An exercise of the Spending [*840] Power is permissible only when it is in the pursuit of "the ... general [**24] Welfare of the United States." *Dole, 483 U.S. at 207;* see also *Helvering v. Davis, 301 U.S. 619, 640-641, 81 L. Ed. 1307, 57 S. Ct. 904 (1937); Butler, 297 U.S. at 65*. The second limitation requires that any conditions on the federal grant be clearly presented to the States for their acceptance or rejection along with the grant itself. *Dole, 483 U.S. at 207*. The third requirement is that the conditions on the federal grant be related to the federal interest involved in the various national projects or programs. *New York v. United States, 505 U.S. 144, 167, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992); Dole, 483 U.S. at 207-208*. The last requirement is that Congress' exercise of its Spending Power not violate any other constitutional provision. *Dole, 483 U.S. at 208*. The Court will separately discuss each of these four limitations in light of defendants' argument that RLUIPA represents an unconstitutional exercise of Congress' Spending Power.

1. Pursuit of the General Welfare

Defendants do not seriously contend that RLUIPA does not further the general welfare of [**25] the United States. The Supreme Court has recognized that [HN6] a determination of what constitutes the "general welfare" of the citizens is left to Congress' discretion "unless the choice is clearly wrong [or] a display of arbitrary power [rather than] an exercise of judgment." *Helvering, 301 U.S. at 640*. The concept of the general welfare is not static, and "needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation." *Id., at 641*. Recent decisions have recognized that "the level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." *Dole, 483 U.S. at 207 n. 2*, citing *Buckley v. Valeo, 424 U.S. 1, 90-91, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)* (per curiam). Consequently, [HN7] the Court holds that RLUIPA is sufficiently related to the general welfare of the United States to survive a constitutional challenge on that ground.

2. Timely and Unambiguous Statement of Conditions.

Although presented in Dole as a single element of the four-point test, [HN8] the [**26] second requirement actually encompasses the consideration of two interrelated constitutional concerns. First, any condition imposed by Congress on the receipt of federal funds must be "unambiguous" so that "states [may] exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst, 451 U.S. at 17;* see also *Dole, 483 U.S. at 207*. Thus, a state must be able "to ascertain what is expected of it" by the language of the statute. *Pennhurst, 451 U.S. at 17*. Consequently, the conditions must be articulated in a way that allows a state to be certain of the consequences of its obligation to enforce the requirement. Second, such conditions may not be imposed on the states after the funds have been received. "Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions." *Pennhurst, 451 U.S. at 25*. Defendants contend that the application of RLUIPA in this case offends the Constitution on both grounds and, as a result, the second prong of the Dole test cannot be met.

Taking these [**27] issues in reverse order, the Court turns first to the retroactivity issue. [*841] Both plaintiffs and the United States concede that RLUIPA was not intended to apply to federal funds disbursed prior to its effective date and that it could not constitutionally do so. However, the plaintiffs are seeking only prospective relief under RLUIPA. Defendants have stipulated that, after RLUIPA's effective date, and even after plaintiffs amended their complaint to include a claim under RLUIPA, they made additional applications

for federal funds. Although, at the time the parties entered into their stipulations, defendants had not actually received any funds pursuant to their post-RLUIPA applications, defendants acknowledged that they expected to receive such funds as early as August, 2001, the month in which this Report and Recommendation is being issued, and that they will continue their long-standing practice of applying for and receiving federal funds as this lawsuit progresses. Consequently, this case clearly presents the question of whether Congress intended to condition the receipt of those funds applied for and disbursed after September 22, 2000 upon compliance with RLUIPA, and whether it did [**28] so in a constitutional manner. In short, no retroactivity issue is raised by the facts of this case.

The more serious issue raised by defendants' motion is whether the first prong of the "notice" criterion has been satisfied. Defendants present two arguments: (1) that RLUIPA's language is not sufficiently clear to advise the states that compliance with RLUIPA is a condition attached to the receipt of federal funds; and (2) even if the language is clear enough to advise the states that they are receiving funds conditioned upon compliance with RLUIPA, what amounts to "compliance" is so vague and fact-specific that the states cannot reasonably comprehend what obligations they are accepting if they continue to receive federal funds to be used in prison operations. Neither of these arguments has merit.

Defendants' first argument relies heavily on the Pennhurst case. Pennhurst held that a specific section of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, *42 U.S.C. § § 6000* et seq., was not intended to be an enforceable condition on the states' receipt of federal funds under that Act. In so holding, the Court contrasted the language [**29] of the "Bill of Rights" portion of the Act, *42 U.S.C. § 6010*, with other sections of the same statute, and observed that "noticeably absent from § 6010 is any language suggesting that § 6010 is a 'condition' for the receipt of federal funding under the Act." *Pennhurst, 451 U.S. at 13.* The Court also examined the relevant legislative history and the overall structure of the Act, and reached the conclusion that although Congress intended other provisions of the Act to impose new legal duties upon states which accepted funding under the Act, § 6010 did not do so. *Id. at 21-27.* Defendants assert that this case is controlled by Pennhurst because the drafters of RLUIPA failed to use the word "condition" or an equivalent term, and that Pennhurst requires any expression of Congressional intent to be that precise. See also *Dole, 483 U.S. at 208* (noting that "the conditions upon which States receive the funds [under *23 U.S.C. § 158*, which explicitly directs the Secretary of Transportation to withhold funds from states in which persons under the age of 21 are permitted to purchase or [**30] possess alcoholic beverages] ... could not be more clearly stated by Congress").

A common-sense reading of RLUIPA as a whole is sufficient to refute defendants' argument. *42 U.S.C. § 2000cc-1*, the specific section of RLUIPA which applies to institutionalized persons, begins with these [*842] words: "No government shall impose a substantial burden on the religious exercise of a person ... confined in an institution ...." To argue that such language is a mere "congressional preference for certain kinds of treatment" as opposed to language which "creates rights and obligations," *Pennhurst, 451 U.S. at 18-19,* is to ignore the plain meaning of the phrase "no government shall ...." [HN9] "Shall" is quintessentially a word associated with obligations and rights. The creation of a private right of action in § 2000cc-2 to enforce this obligation ("[a] person may assert a violation ... as a claim ... in a judicial proceeding and obtain appropriate relief against a government") certainly suggests that Congress intended states receiving federal funds for prison programs or activities to be held accountable for breaching the obligation set forth in § 2000cc-1. [**31] Finally, § § 2000cc-3 (c) and (d) would be entirely unnecessary if the statute were simply intended to "nudge" the states in the direction of imposing lesser burdens on the free exercise of religion by institutionalized persons, *Pennhurst, 451 U.S. at 19,* quoting *Rosado v. Wyman, 397 U.S. 397, 413, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970).* Those subsections make it clear that the Act "may *require* a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise" and that the only activity affected by the Act is that of "a government *as a condition of receiving funding or other assistance* [for its programs or activities]" (emphasis supplied). The language of RLUIPA, fairly read, strongly evinces Congress' intent "to require the States to fund new, substantial rights," *Pennhurst, 451 U.S. at 18,* and therefore makes it clear to states which continue to apply for federal funding for prison programs that they will be subject to RLUIPA.

Furthermore, the language used in the Act closely parallels other federal statutes conditioning federal funding that have long been deemed to satisfy [**32] the notice requirement. See, e.g., *Davis v. Monroe County Bd. Of Educ., 526 U.S. 629, 649-650, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999)* (involving Title IX, *20 U.S.C. § 1681* (a), which states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"); *Guardians Ass'n v. Civil Service Com'n of City of New York, 463 U.S. 582, 598-599, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)* (involving Title VI, *42 U.S.C. § 2000d,* which states,

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"). Consequently, [HN10] the Court holds that RLUIPA adequately expresses Congress' intent to condition further payment of federal funds to state prison programs upon the states' compliance with RLUIPA.

Assuming that Congress did intend to make the states' [**33] continued receipt of funds for prison activities or programs conditional upon compliance with RLUIPA, defendants argue that the wording of the statute is too vague to allow them to make an informed choice as to whether or not to accept such funds. In the memorandum supporting the motion to dismiss, defendants, relying on dictum from Pennhurst, argue that the requirement that they use the "least restrictive means" to implement otherwise permissible restrictions on an inmate's exercise of religion "is so context-driven and subjective as to be no standard at all ...." Defendants' Memorandum, at 27. In their reply, defendants expand [*843] their argument, describing the Supreme Court's decision in *Suter v. Artist M., 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992)* and a large number of decisions from lower courts as a "significant body of precedent ... [striking] down similar spending statutes." Defendants' Reply, at 7.

Pennhurst, of course, did not strike down *42 U.S.C. § 6010* as an impermissibly vague exercise of the Spending Power. Rather, it held that § 6010 was not an exercise of the Spending Power at all. Similarly, the issue [**34] in Suter was whether certain language in the Adoption Assistance and Child Welfare Act of 1980, see U.S.C. § 671, provided for either a private right of action in favor of beneficiaries of the Act, or created rights assertable in an action under *42 U.S.C. § 1983,* to enforce the states' obligation to use "reasonable efforts" to keep biological families intact. In light of the fact that the only statutory obligation imposed on the states by § 671 was to submit a plan to the Secretary dealing with efforts to eliminate the need to remove children from their homes, the Court held that:

> Careful examination of the language relied upon by respondents, in the context of the entire Act, leads us to conclude that the "reasonable efforts" language does not unambiguously confer an enforceable right upon the Act's beneficiaries. The term "reasonable efforts" in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.

Id. at 362-363. The Court did not invalidate the Act as an impermissibly vague [**35] exercise of the Spending Power but specifically noted that the Secretary of Health and Human Services had the power to enforce the Act against the States, including the "reasonable efforts" requirement that the defendants in this case characterize as too vague to be enforceable. *Suter, 503 U.S. at 360-61.*

Defendants cite nine cases in addition to Suter which, according to their reply memorandum, support the proposition that similar language found in Spending Clause statutes has been held to be too vague to be judicially enforceable. Defendants neglect to state (and perhaps do not appreciate) that each of these cases, like Suter, did not consider the fundamental question of when a Spending Clause statute is so vague that a state cannot reasonably be required to comply with its mandates. In every case cited by defendants, the issues were (1) whether the statute at issue was enforceable by private individuals in a suit brought pursuant to § 1983, (2) whether a private right of action could be implied directly under the statute, or (3) both. The specificity of the obligations imposed upon the states by the statute in question is one of several factors pertinent [**36] to these questions, but in none of these cases did the court hold that the statute itself was an invalid exercise of Congress' Spending Power, and several, including Suter, made it perfectly clear that the statutes imposed valid obligations on the states, even if no private individual was entitled to sue for a violation of those obligations. Defendants' effort to obscure the difference between what is a valid exercise of the Spending Power and when, absent a specific Congressional intent to create a private cause of action, a private individual may sue to enforce that valid exercise of the Spending Power, is, at the least, unhelpful to the ultimate resolution of this issue.

Despite the fact that defendants did not cite a single case which invalidated any portion of a statute enacted pursuant to Congress' Spending Power on vagueness grounds, the Court will still address the [*844] issue presented. Obviously, the wording of RLUIPA parallels that of the "strict scrutiny" standard developed by the Supreme Court and used in a number of different Constitutional analyses, including religious accommodation cases. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hileah, 508 U.S. 520, 546, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993)* [**37] (religious accommodation); *Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 718, 67 L. Ed. 2d 624,*

101 S. Ct. 1425 (1983)("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *U.S. v. Playboy Entertainment Group, 529 U.S. 803, 813, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000)*(first amendment). This standard has been used in Constitutional jurisprudence for at least the last 100 years. Furthermore, this standard has been used to analyze many constitutional complaints of prisoners prior to the Supreme Court's decision in *Turner v. Safley, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*, see, e.g., *Procunier v. Martinez, 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800, 71 Ohio Op. 2d 139 (1974)*, and under RFRA prior to the Boerne decision.

[HN11] The Court concludes first, that this standard is not so vague that States cannot reasonably appreciate the obligations they are choosing to undertake by continuing to accept federal money for prison programs. It is true that state officials will be required to evaluate religious [**38] freedom claims somewhat differently than under Turner, and that to some extent they will be subject to judicial "second-guessing" as to whether they have chosen the "least restrictive means" of implementing compelling state interests. The fact that they cannot predict with 100% accuracy exactly how they will be required to respond to any specific inmate's request for an accommodation of his or her religious practices, however, does not mean that state officials are left completely in the dark as to what RLUIPA will generally require them to do. Indeed, defendants' own memoranda are replete with details of what compliance with RFRA entailed. RLUIPA puts the states on notice that a similar response will be required under its terms. If Ohio does not wish to return to the pre-Boerne RFRA days, it can simply refuse the money.

Moreover, in light of the case law cited above, it is far too late in the day to suggest that RLUIPA's "strict scrutiny" standard is too vague to be judicially enforceable (if, in fact, that is even a consideration when Congress expressly provides for a private right of action under the statute). Courts have been enforcing that exact standard against state [**39] action for years. States are required to tailor their actions to that standard in almost every First Amendment situation arising outside the prison setting. Consequently, defendants' vagueness argument is an insufficient basis for invalidating RLUIPA under the Spending Clause.

3. Relationship to Funding

Next, defendants argue that there is not a substantial enough connection between federal funding for prison activities or programs and the free exercise of religion by prisoners to support RLUIPA as a valid exercise of the Spending Power. Defendants argue that the conditions here bear no relationship to the funds being provided by the state, citing *Rust v. Sullivan, 500 U.S. 173, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991)*, and that the conditions are void as unacceptably disproportionate to the relatively small percentage of funds being provided to the state, citing *FCC v. League of Women Voters, 468 U.S. 364, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984)*. Specifically, defendants argue that although ODRC receives federal funds for various prison programs, "none of those funds have any relation to religion." Defendants' [*845] Memorandum, at 28. The Court [**40] finds these contentions unfounded.

South Dakota v. Dole involved a challenge to Congress' effort to encourage all states to raise the legal drinking age to 21. The statute at issue in that case, *23 U.S.C. § 158*, authorized the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable to any state where the minimum drinking age was under 21. As in this case, the state argued that Congress had exceeded its Spending Power by conditioning the receipt of federal funds designated for one purpose (i.e. the construction and maintenance of highways) on the states' compliance with Congress' wishes in an unrelated matter, namely the minimum drinking age. Although the Supreme Court acknowledged in Dole that prior cases had, "without significant elaboration," suggested this limitation, *id. 483 U.S. at 207*, it soundly rejected the states' challenge to § 158, holding that the drinking age issue was "directly related to one of the main purposes for which highway funds are expended - safe highway travel." *Id. at 208*.

Defendants have failed to cite a single decision, either from the Supreme Court or any other court, which struck [**41] down an exercise of the Spending Power because the purpose of the funds was not reasonably related to the encumbering condition imposed upon their receipt. Both *Rust v. Sullivan, supra,* and *League of Women Voters, supra,* were decided on other grounds, and Rust *upheld* the federal restrictions at issue, thus undercutting the force of defendants' assertion that plaintiffs have failed "to explain how RLUIPA's agency-wide mandate can be squared with the Court's decision [] in ... Rust ...." Reply brief, at 11. Plaintiffs cite to the Eighth Circuit's decision in *Jim C. v. United States, 235 F.3d 1079 (2000)* (en banc), cert. denied, *121 S. Ct. 2591 (2001)*, as a recent example of a holding supporting a broad interpretation of the "reasonably related" requirement, and that court did reject, at least implicitly, the dissenters' view that the condition attached to receipt of funds under the Rehabilitation Act (the states' waiver of their Eleventh Amendment immunity from suit under the Act) "bears no direct relationship ... to the purpose of most federal grants to the state for education." *Id. at 1083* [**42] (Bowman, J., dissenting).

The Court will assume (although the Dole Court expressly refused to decide the question) that a direct relationship between the programs receiving federal funds and the conditions attached to those funds is required. In this case, giving due deference to Congress' determination that such a relationship exists, the Court agrees with plaintiffs that there are a myriad of direct connections between the funds made available to state prisons and the restrictions imposed by RLUIPA. On the most basic level, the exercise of religion by prisoners, and the presumed rehabilitative benefits derived from that exercise, pervade the entire prison environment. Moreover, plaintiffs have identified specific programs within ODRC (see Plaintiffs' Joint Reply to Defendants' Motion to Dismiss, at 19) which both receive federal funding and deal specifically with inmate rehabilitation. This connection is at least as direct as that between funds allocated for highway construction and the minimum drinking age. [HN12] Given the discretion granted to Congress to determine, in the first instance, the need to enact specific legislation to further the general welfare, and the precept that [**43] courts may strike down otherwise properly-enacted federal legislation only if it clearly exceeds constitutional limits on the Article I power, the Court concludes that the relationship between federal funds received [*846] by ODRC and the religious practices of inmates confined in institutions under the jurisdiction of the ODRC is sufficiently direct to insulate RLUIPA from this particular constitutional challenge.

4. Whether RLUIPA violates the Establishment Clause

Finally, defendants maintain that RLUIPA violates the Establishment Clause as well as the Tenth Amendment to the United States Constitution. The Tenth Amendment issue will be addressed later in this Report and Recommendation. For the following reasons, [HN13] the Court concludes that RLUIPA does not violate the First Amendment's Establishment Clause.

[HN14] The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. Amend. I. Although some members of the Court have recently expressed their discontent with the three-part test contained in *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*, it remains [**44] the current standard by which to determine whether a statute violates the Establishment Clause. *Mitchell v. Helms, 530 U.S. 793, 147 L. Ed. 2d 660, 120 S. Ct. 2530 (2000); American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board, 243 F.3d 289 (6th Cir. 2001)*. To pass constitutional muster, the statute in question (1) must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) the statute must not foster an "excessive government entanglement" with religion. *Lemon, 403 U.S. at 612-13; Capitol Square Review, 243 F.3d at 306*. Defendants, citing to *Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 86 L. Ed. 2d 557, 105 S. Ct. 2914 (1985)* and *Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 103 L. Ed. 2d 1, 109 S. Ct. 890 (1989)*, contend that RLUIPA fails the second prong of this test because it constitutes an impermissible government endorsement of religion and would also impermissibly burden third parties such as prison staff or other inmates.

In the Court's view, defendants' Lemon argument is [**45] completely foreclosed by *Corporation of the Presiding Bishop of the Church of Jesus Crist of Latter-Day Saints v. Amos, 483 U.S. 327, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987)*. Amos also involved an Establishment Clause challenge to a federal statute - in that case, *42 U.S.C. § 2000e-1*, § 702 of Title VII of the Civil Rights Act of 1964 - which exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. The district court had concluded that the exemption had the primary effect of advancing religion, thus running afoul of the second prong of the Lemon test. In so concluding, the district court found it significant that only religious organizations obtained a benefit from the operation of the statutory exemption, and that it "burdened the free exercise rights of employees of religious organizations who work in nonreligious jobs." *Id. at 333*.

The Supreme Court unanimously reversed the district court, specifically rejecting its reasoning about the effects of § 702. In so doing, it held, first, that [HN15] governments may, in their effort to accommodate religion, [**46] go beyond what is minimally required of them by the Free Exercise Clause without running afoul of the Establishment Clause. *Id. at 334-35*. Second, it noted that government is permitted, under Lemon, "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions" so long as the government does not [*847] "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Id. at 335*. The Court rejected the notion that any law which makes it easier for a religion to carry out its mission is unconstitutional, noting that "religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster," such as laws which provide tax exemptions to religious organizations or which permit school supplies to be loaned to students attending parochial schools. *Id. at 336*. What is prohibited is the "*government* itself ... advancing religion through its own activities and influence." *Id. at 337*. Finally, the Court rejected the notion that a law which singles [**47] out religions for the benefit it confers is *per se* unconstitutional. If that were

so, any law designed to minimize the burdens otherwise placed on religion by governmental regulation would fail. As the Court concluded, "where ... government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities." *Id. at 338.*

Somewhat surprisingly, defendants' initial memorandum does not even cite to Amos, let along attempt to distinguish it. Defendants' Memorandum, at 42-44. In their reply memorandum, defendants offer two bases for distinguishing Amos from the facts of this case: (1) that the statutory exemption at issue in Amos "did not give the beneficiaries anything they did not already have before Congress initially legislated in the area," id. at 32, and (2) that the effect of § 702 was simply to "[withdraw] the sovereign from the dispute between the beneficiary and the third party [i.e. the affected employee]" as opposed to having the government "[weigh] in on behalf of religious beneficiaries in their disputes with third [**48] parties." Id. at 34. They continue to rely on Calder and Texas Monthly as countervailing authority, noting that they do not disagree with the fundamental principle, recognized in Amos, that the government may lawfully provide additional accommodations for religious practices not mandated by the Free Exercise Clause, but contending that these accommodations are not permissible if they impose burdens on third parties as a result. Id. at 29-30. The specific burdens that defendants point to are the lessening of protection for prison staff and other inmates that, in their view, will necessarily result from increased accommodation of prisoners' religious practices.

It is true that the statutory scheme involved in Amos first imposed a restriction on the ability of all private employees, including religious organizations, to discriminate on the basis of religion, and then exempted religious organizations from that restriction, thus restoring them to the same status they enjoyed prior to the enactment of Title VII. Laws providing for tax exemptions fall into the same category. However, the same cannot be said for the statute at issue in *Board of Education v. Allen, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968),* [**49] which conferred upon parochial school children the right to receive loaned textbooks free of charge, a right they did not enjoy prior to the passage of the statute, and certainly not one conferred upon them by the Constitution. Allen was cited by Amos with approval as an example of a law that both assisted a religious organization in carrying out its religious mission and which passed constitutional muster under the Lemon test. *Amos, 483 U.S. at 336-37.* In short, defendants have attempted to graft onto the Lemon test an additional requirement that government may not legislate to provide any accommodations to religion unless those accommodations are [*848] either constitutionally mandated by the Free Exercise Clause or take the form of exemptions from laws of general application that impose a burden on the free exercise of religion, even if that burden could be constitutionally imposed. Not surprisingly, there is no authority to support this additional requirement, and Amos cannot be properly distinguished from this case on that ground.

Texas Monthly and Caldor provide no support for defendants' position. Defendants cited Texas Monthly for [**50] the proposition that "an endorsement [of religion] occurs if government provides a benefit to religious adherents that is not necessary to avoid a Free Exercise violation and that benefits imposes burdens on third parties." Defendants' Memorandum, at 42. In fact, Texas Monthly dealt with the vastly different issue of government *subsidies* to religion, *Texas Monthly, 489 U.S. at 15* (Brennan, J.), and specifically rejected Texas' argument that its tax subsidy for religious publications was sustainable on grounds that it was reasonably necessary to accommodate the free exercise of religion. *Id. at 18 & n.8.* Justice Brennan, speaking for only three members of the Court, did indicate, in dictum, that even reasonable accommodations of free exercise such as the one approved by the Court in Amos might fail if they imposed monetary costs or other substantial burdens on third parties in the form of an increased tax burden. Id.; see also *Children's Healthcare is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000),* cert. denied, *121 S. Ct. 1483 (2001).* However, defendants have not cited a single [**51] case in which such a law has been held unconstitutional on that ground.

Caldor, which is cited by defendants as such a case (and also referred to as a "unanimous opinion," Defendants' Reply, at 30, even though Justice Rehnquist dissented), actually held that the statute at issue there, which allowed any employee to choose not to work on his or her designated Sabbath, violated the Establishment Clause because it had "the primary effect [of] impermissibly advancing a particular religious practice." *Caldor, 472 U.S. at 710.* Moreover, it did so without regard to the consequences to persons who did not benefit from the statute's protection. However, to the extent that Caldor considered the burden imposed upon third parties as a factor in determining whether the statute impermissibly advanced a particular religious practice, it is easily distinguished from this case.

In Caldor, the right granted to persons whose religion included a Sabbath (and, of course, that is not a universal religious observance) was made absolute, and no countervailing interests of employees or co-workers were permitted to outweigh it. If RLUIPA commanded the states to accommodate any [**52] *bona fide* religious

practice of institutionalized persons without regard to considerations of prison security, it would suffer from a similar defect. However, [HN16] RLUIPA specifically permits safety and security - which are undisputedly compelling state interests - to outweigh an inmate's claim to a religious accommodation so long as there is a sufficient nexus between that interest and the denial of the requested accommodation, and there is no reasonable alternative to denial that would accommodate both the free exercise of religion and the need to maintain order in the prison environment. Although defendants, citing to their experience under RFRA, contend that it is factually impossible to provide the kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates, the Court does not believe it is appropriate to make such a factual finding on this record. Further, it seems unlikely that one court [*849] could strike down an entire statute on constitutional grounds simply because one state claims to have had difficulty meeting the requirements of a similar statute in the past. [HN17] At a minimum, Caldor would [**53] seem to suggest that the constitutional infirmity of a statute like RLUIPA would flow from consequences that are evident or on the face of the statute and which, due to the absolute nature of the statute's requirements, cannot be avoided by any amount of statutory interpretation. Where, as here, it is an open question as to the extent of the burdens (if any) RLUIPA will necessarily place on third parties such as other inmates or taxpayers, and where the courts will be given the chance to interpret RLUIPA's requirements in order to avoid placing unconstitutional burdens on others in order to accommodate the free exercise of religion, the statute will withstand the kind of challenge that defendants raise. Additionally, it is worth noting that although no other federal court has decided whether RLUIPA violates the Establishment Clause, every circuit court considering a similar challenge under the comparable provisions of RFRA found that it did not and does not violate the Establishment Clause. See *Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir.1997); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir.1995); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir.1996);* [**54] *EEOC v. Catholic Univ., 317 U.S. App. D.C. 343, 83 F.3d 455, 470 (D.C.Cir. 1996).*

Finally, Defendants argue that RLUIPA violates an overarching principle of Spending Clause constitutional jurisprudence, namely that the pressure exerted on the states to accept the conditions placed on the grants rises to the level of coercion. See, e.g., *Dole, 483 U.S. at 211; Steward Machine Co. v. Davis, 301 U.S. 548, 590.* Although the case law discussing this aspect of the Spending Clause provides little guidance, the Court notes that the federal funds at issue in this case, even if withheld in their entirety, constitute less than 1% of the entire budget of the ODRC. See Defendants' Memorandum at 20. While the Court has no doubt that these funds would be missed, the fact remains that [HN18] the potential loss of this relatively small amount of the funding by the States does not cross the generalized line established by the prior cases and turn enticement into compulsion. See generally, *Dole, 483 U.S. at 211* (loss of 5% of federal highway funds not coercive); *Steward Machine Co. v. Davis, 301 U.S. at 590.* Here, as in Dole, [**55] "Congress has offered relatively mild encouragement to the States" to achieve a desired objective. *Dole, 483 U.S. at 211.* The guiding principle established by the Supreme Court in Steward Machine Co. almost sixty years ago still holds true today:

> Every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.

Id., 301 U.S. at 589-590. This Court will not conclude, on the facts before it, that the Defendants would be forced to surrender their position as co-equal sovereigns in the federal system as a result of the conditions expressed in RLUIPA. See *New York, 505 U.S. at 167, 188.* Accordingly, after considering all of defendants' contentions, the Court finds RLUIPA to be a proper exercise of Congressional power pursuant [**56] to the Spending Clause.

[*850] IV.

Defendants maintain that regardless of whether RLIUPA is deemed to be a constitutional exercise of Congress' power, the Tenth Amendment and the Eleventh Amendment provide the state with immunity. These issues do not require extended discussion.

A. Tenth Amendment Immunity

The Tenth Amendment to the United States Constitution provides that [HN19] "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [HN20] This provision has long been interpreted by the Court to ensure that the federal government remains one of "limited powers," *Gregory v. Ashcroft,*

501 U.S. 452, 457, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991), determining "what powers in fact have been given [to it] by the people." *United States v. Butler, 297 U.S. 1, 63, 80 L. Ed. 477, 56 S. Ct. 312 (1936)*.

First, the Court has already held that RLUIPA is a constitutional exercise of the Spending Power. The Supreme Court conclusively held in Dole that [HN21] the Tenth Amendment stands as no independent constitutional bar to such legislation. *Id., 483 U.S. at 210-11.* [**57] Accordingly, Defendants' Tenth Amendment argument necessarily fails. Defendants seek, however, to extend the reach of a number of relatively recent Supreme Court decisions, including *Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999), United States v. Printz, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997), New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)*, and *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)*, to establish a new type of Tenth Amendment immunity constituting a "structural immunity from suit that extends beyond the Eleventh Amendment." Defendants' Memorandum, at 52. Defendants' are correct that [HN22] the scope of the state's sovereign immunity "neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden, 527 U.S. at 713.* However, Alden simply held that the Constitution did not give Congress the power to waive a state's sovereign immunity from suit in its own courts. In Alden, the legislature at issue was not passed pursuant to any Congressional [**58] power to affect the states' sovereign immunity under the Eleventh Amendment or otherwise. Alden did not affect the Court's holdings in other cases that [HN23] the determination of whether a particular statute violates the Tenth Amendment is necessarily a determination of whether Congress was within its enumerated powers in passing the contested legislation:

> Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers Engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York, 505 U.S. at 156-157. [**59] [HN24] Because Congress acted constitutionally under the Spending Clause in passing RLUIPA, Ohio's Tenth Amendment [*851] rights necessarily have not been violated.

B. Eleventh Amendment Immunity

[HN25] The Eleventh Amendment provides that "the Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. Amend. XI. [HN26] Although the text of the Amendment creates no immunity against citizens attempting to sue their own state, it has long been settled that the Amendment, representing the concept of states as co-equal sovereigns with the federal system bars such suits. *Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996)* ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting states was not contemplated by the Constitution when contemplating the judicial power of the United States.")(internal citations and quotation marks omitted); see also *Hans v. Louisiana, 134 U.S. 1, 15, 33 L. Ed. 842, 10 S. Ct. 504 (1890).* [**60] Furthermore, suits which raise civil claims against state officials for actions committed while serving in their official capacity but are, in essence, a claim against the state are barred by the Eleventh Amendment. See *Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 462-464, 89 L. Ed. 389, 65 S. Ct. 347 (1945)*(holding that when action is essentially one for recovery of money from the state, even though individual officers are nominal defendants, the state is the real, substantial party in interest and entitled to sovereign immunity under the Eleventh Amendment).

[HN27] Although Congress has the power to abrogate a state's Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment, see *Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976)*, in Seminole Tribe, the Court expressly overruled contrary precedent (*Pennsylvania v. Union Gas Co., 491 U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989))* and firmly established that Congress may not abrogate state sovereign immunity under any of its Article I powers. See *Seminole, 517 U.S. at 72-73;* see also [**61] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 636, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999).* Defendants

claim that because Congress purported to pass RLUIPA pursuant to its Commerce Clause powers and because neither the State of Ohio nor the ODRC waived its Eleventh Amendment immunity, Defendants are immune from suit under RLUIPA. Here, the Court has held that RLUIPA was validly enacted pursuant to Congress' Spending Clause powers. In accepting the terms of the federal grants, Defendants necessarily accepted all of the conditions Congress established for funds eligibility. While the Court in Florida Prepaid may have found the doctrine of constructive waiver inapplicable in the Commerce Clause context, they did not find the Spending Clause powers so limited:

> We have held in such cases as South Dakota v. Dole that [HN28] Congress may, in the exercise of its spending power, condition the grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. *These cases seem to us fundamentally different from* [**62] *the present one.*

Id., 527 U.S. at 636 (emphasis added)(internal citations omitted). As a result, [HN29] the state's acceptance of the terms pursuant to the Spending Clause necessarily establishes its acquiescence to § 2(a) of the Act, providing that "[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding [*852] and obtain appropriate relief against a government," where the term "government" includes a state, its departments, or its officials. *42 U.S.C. § 2000cc-5*(4)(A).

Even had the defendants not consented to suit under the Act, [HN30] the doctrine of *Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)* remains good law in providing that plaintiffs, as here, may bring a suit against a state official seeking prospective injunctive or declaratory relief to conform their behavior to comply with federal law without running afoul of the Eleventh Amendment. See Idaho v. Coeur d' *Alene Tribe, 521 U.S. 261 (1997).* Despite Defendants' insistence to the contrary, RLUIPA is valid federal law, and Ex parte Young serves to insure that Plaintiffs can maintain an action against [**63] defendants to enforce compliance with the statute.

Defendants also contend that this is a case like Coeur d'Alene, so that a suit under RLUIPA which proceeds on an Ex Parte Young theory would violate the Eleventh Amendment. In Coeur d'Alene, an Indian tribe filed suit in federal court seeking to validate its claim of ownership to lands submerged under Lake Coeur d'Alene and certain surrounding rivers and streams. The Court held that the suit was the functional equivalent of an action to quiet title, which the Eleventh Amendment clearly prohibited, and that the state's interest in possession and control over property lying within its boundaries was sufficiently strong to justify recognition of a unique sovereign interest inconsistent with the application of the Ex Parte Young exception. See Coeur d' *Alene, 521 U.S. at 286-288; Ford Motor Company v. Department of Treasury of Ind., 323 U.S. 459, 464, 89 L. Ed. 389, 65 S. Ct. 347 (1945).*

Defendants claim that the same principle should apply to suits brought under RLUIPA because the relief available to prisoners - changing the way the state administers the religious exercise portion of [**64] its prison programs - is "the functional equivalent of relief that could not be obtained directly against the state under the Eleventh Amendment," Defendants' Memorandum, at 50, or because RLUIPA is a statute of "dubious constitutionality" and therefore represents a unique intrusion into the traditional state function of running a prison. Defendants' Reply, at 38. The Court has rejected the latter contention, and in any event is unaware of any decisions suggesting that the application of Ex Parte Young depends upon whether the underlying federal statutory right to be enforced is one whose constitutionality may fairly be subject to debate. As to the former contention, [HN31] the Eleventh Amendment clearly does not now prohibit prisoners from utilizing Ex Parte Young to obtain accommodations for their religious practices. The only difference is that the courts have judged the states' policies under the more deferential Turner standard. However, a decision favoring a prisoner in such a case still may require a prison to "rewrite" its policies, the very relief which defendants contend is unavailable under the Eleventh Amendment. Additionally, this is not a case like *ANR Pipeline v. LaFaver, 150 F.3d 1178 (10th Cir. 1998),* [**65] where Congress itself had, through the Tax Injunction Act, expressly recognized the states' sovereign interest in assessing and collecting taxes without significant federal interference. RLUIPA is an obvious Congressional determination that the states do not have an interest in regulating the religious exercise of institutional persons that cuts to the very core of state sovereignty, and this Court is not persuaded that it should so hold.

V.

Based on the foregoing, it is recommended that the Court find RLUIPA, *42 U.S.C. § § 2000cc* et seq., to be a constitutional [*853] exercise of Congress' Spending Power. Furthermore, it is recommended that the Court find that neither the Tenth nor Eleventh Amendments provide the defendants with immunity from RLUIPA's provisions. Consequently, it is recommended that defen-

dants' motion to dismiss, with the exception of that portion directed to plaintiffs' claims under the Ohio Constitution, be denied.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within ten (10) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings [**66] or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. *28 U.S.C. § 636*(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. See *Thomas v. Arn, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985); United States v. Walters, 638 F.2d 947 (6th Cir. 1981).*

Terence P. Kemp

United States Magistrate Judge

8/27/01

ORIGINAL

No. 03-9877

SUPREME COURT, U.S.
FILED
JUL 13 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JON B. CUTTER, ET AL., PETITIONERS

v.

REGINALD WILKINSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the institutionalized-persons provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc-1, are valid under the Establishment Clause of the First Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 349 F.3d 257. The opinion and order of the district court (Pet. App. B), adopting the report and recommendation of the Magistrate Judge, is reported at 221 F. Supp. 2d 827.

JURISDICTION

The court of appeals entered its judgment on November 7, 2003. The court of appeals denied petitions for rehearing on March 3, 2004. The petition for a writ of certiorari was filed on April 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. RLUIPA is a civil rights law designed to provide, as a matter of statutory right, heightened protection for the free exercise of religion and to prevent religious discrimination in particular settings. At the time of RLUIPA's enactment, evidence before Congress demonstrated that, in the absence of federal legislation, prisoners, detainees, and individuals institutionalized in mental hospitals faced substantial and unwarranted burdens in freely practicing their religious faiths. See, e.g., H.R. Rep. No. 219, 106th Cong., 1st Sess. 9-10 (1999) (summarizing testimony). Based on the evidence it compiled, Congress concluded that the rights of institutionalized persons to practice their faith often were burdened by "frivolous or arbitrary rules," and that, whether for reasons of "indifference, ignorance, bigotry, or lack of resources," some institutions restrict religious liberty in "egregious and unnecessary ways." Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7775 (daily ed. July 27, 2000).

Congress responded by enacting Section 3 of RLUIPA to provide institutionalized persons protection from unnecessary burdens on religious practice. 42 U.S.C. 2000cc-1.[1] Section 3(a) provides

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[1] Section 2 of the statute, 42 U.S.C. 2000cc, protects persons and entities against land-use regulations that burden religious exercise or discriminate on the basis of religion. That portion of RLUIPA is not at issue in this suit.

that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a).[2] RLUIPA defines the "government" to which it applies as "a State, county, municipality, or other governmental entity created under the authority of a State," and "any branch, department, agency, instrumentality, or official of [such] an entity." 42 U.S.C. 2000cc-5(4).[3]

Invoking its power under the Spending Clause, U.S. Const., Art. I, § 8, cl. 1, Congress required compliance with Section 3(a) whenever "the substantial burden [on religion] is imposed in a

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[2] 42 U.S.C. 2000cc-1(a) provides in full:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person --
>
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

[3] Through the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq., Congress has imposed a much broader obligation on the federal government to justify substantial burdens on religion imposed by any federal governmental activity -- not just zoning or institutionalization.

program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1). Congress also exercised its Commerce Clause power, U.S. Const., Art. I, § 8, cl. 3, as an independent constitutional basis for Section 3 in those cases where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-1(b)(2). However, even if a plaintiff demonstrates the requisite effect on commerce, RLUIPA's provisions do not apply if the defendant demonstrates, as an affirmative defense, that the type of burden at issue, in the aggregate, would not have a substantial effect on commerce. 42 U.S.C. 2000cc-2(g).[4]

RLUIPA creates a private right of action, which allows any individual whose exercise of religion has been substantially burdened to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). The United States

[4] 42 U.S.C. 2000cc-2(g) provides:

> If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

also may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. Petitioners are inmates incarcerated in Ohio correctional facilities who profess to subscribe to a variety of religious denominations, including the Church of Jesus Christ Christian, Odinism, and the Wiccan faith. Each petitioner claims that prison officials failed to accommodate his religious exercise in a variety of different ways. Pet. App. B at 5. The petitioners commenced three separate suits against officials of the Ohio Department of Rehabilitation and Corrections, alleging, as relevant here, that state officials violated RLUIPA by denying their requests for religious accommodation. See Pet. App. A at 3; Pet. 3-5.

The defendants moved to dismiss the complaint on the ground that RLUIPA violates the Establishment Clause and exceeds Congress's Spending Clause and Commerce Clause powers. See Pet. App. B at 3. The United States intervened in the district court, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the statute. See Pet. App. A at 3.

The district court denied the motion to dismiss. Pet. App. B. The court held that RLUIPA's institutionalized-persons provisions are consistent with the Establishment Clause and the Tenth and Eleventh Amendments and reflect a proper exercise of Congress's Spending Clause power. Id. at 3-18.

3. The court of appeals reversed. Pet. App. A. The court held that RLUIPA's institutionalized-persons provisions violate the Establishment Clause. Id. at 4-8. In so holding, the court of appeals recognized that its ruling directly conflicted with the published decisions of two other circuits and two district courts. Id. at 4 (citing Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002), cert. denied, 124 S. Ct. 66 (2003); Johnson v. Martin, 223 F. Supp. 2d 820 (W.D. Mich. 2002); Charles v. Verhagen, 220 F. Supp. 2d 955 (W.D. Wis. 2002), aff'd, 348 F.3d 601 (7th Cir. 2003)). The Fourth Circuit subsequently joined those courts in upholding the constitutionality of RLUIPA's institutionalized-persons provisions. See Madison v. Riter, 355 F.3d 310 (2003), petition for cert. pending, No. 03-1404 (filed Apr. 6, 2004). The panel also recognized that five courts of appeals (the D.C., Fifth, Seventh, Eighth, and Ninth Circuits) have rejected similar Establishment Clause challenges to the Religious Freedom Restoration Act. Pet. App. A at 4 (collecting cases). The court declined to join "this apparent juggernaut of circuit and district court opinions," ibid., based on its contrary view that "RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights," id. at 5, and that "the primary effect of RLUIPA is not simply to accommodate the exercise of religion by individual prisoners, but

to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners," id. at 7. The court further reasoned that RLUIPA "has the effect of encouraging prisoners to become religious in order to enjoy greater rights." Ibid. The court thus concluded that "RLUIPA's inevitable effect is to give greater freedom to religious inmates, and to induce nonreligious inmates to adopt a religion." Ibid.

DISCUSSION

On April 6, 2004, Virginia prison officials filed a petition for a writ of certiorari seeking review of the same Establishment Clause question presented by petitioner in this case. See Petition for a Writ of Certiorari at i, 9-18, Gary Bass, et al. v. Ira Madison, et al., No. 03-1404. The Bass petition also seeks a decision from this Court on whether RLUIPA's institutionalized-persons provisions reflect a proper exercise of Congress's legislative authority under the Spending or Commerce Clauses and whether RLUIPA's institutionalized-persons provisions may be enforced through actions under Ex parte Young, 209 U.S. 123 (1908). See 03-1404 Pet. i (Questions 2 and 3).

On May 28, 2004, the United States filed a brief agreeing that the petition in Bass v. Madison, No. 03-1404, should be granted only with respect to the Establishment Clause question. 03-1404 U.S. Br. 7-10. The United States' brief separately argues (id. at 11-13) that review of the second and third questions presented --

whether RLUIPA's institutionalized persons provisions are valid Spending or Commerce Clause legislation and whether they may be enforced through an action under Ex parte Young, supra -- should be denied because those questions were not decided by the Fourth Circuit, no conflict in the circuits exists on those questions, the Commerce Clause question has not yet been joined in that litigation, and review of the Spending Clause question would be premature before the lower courts have had the opportunity to consider and apply this Court's recent Spending Clause ruling in Sabri v. United States, 124 S. Ct. 1941 (2004). Respondent Madison has also filed a brief acquiescing in certiorari only with respect to the Establishment Clause question.

As discussed in the United States' brief in Bass, 03-1404 U.S. Br. 10 & n.8, the later-filed petition in the present case should be held pending this Court's disposition of the Bass petition and, if review is granted in Bass, pending the Court's decision in that case. The Bass case presents an appropriate vehicle for resolution of the Establishment Clause question presented, and the present case would add nothing distinctive, procedurally or substantively, to the full and fair presentation or consideration of that question. The United States has participated in the Bass case, in defense of the constitutionality of RLUIPA, since the district court. The district court and court of appeals in Bass were presented with and considered a broad spectrum of arguments

pertaining to the Establishment Clause question, and both of those courts accordingly issued thorough yet conflicting decisions that provide a constructive framework for the issue's consideration by this Court. The facts of the Bass case are simple and straightforward, presenting a common, familiar, and fairly illustrative context in which to consider the basis for congressional legislation and to apply the constitutional analysis dictated by the Establishment Clause. Lastly, the posture in which the Bass case arises allows this Court to control the scope of the constitutional issues presented for the Court's consideration by limiting the grant of certiorari to the Establishment Clause question presented, which is the only issue on which the courts of appeals are in conflict and which is the only issue ripe for this Court's review.

The present case, by contrast, provides a less optimal vehicle for this Court's review, due to the multiplicity of parties and factual claims presented in the three combined cases, and the complications in the alignment of all the different parties as petitioners and respondents that would arise were the Court to consolidate consideration of this case with the earlier-filed Bass petition. In addition, were the Court to grant the instant petition, the respondent state officials would be free to raise a host of distinct constitutional challenges to RLUIPA as alternative grounds for affirmance. That would skew the briefing of the case

and could require this Court to address a number of difficult, sensitive, and vitally important constitutional issues without the benefit of their consideration by the court of appeals in the instant case, in Bass, or elsewhere.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in Bass v. Madison, No. 03-1404, and, if review is granted in that case, pending the Court's decision in Bass v. Madison.

Respectfully submitted.

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No. 03-9877

In The Supreme Court Of The United States

JON B. CUTTER, *et al.*,
Petitioners,

v.

REGINALD WILKINSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does application of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), codified in relevant part at 42 U.S.C. § 2000cc-1, to prisons violate the Establishment Clause or other constitutional limitations on Congress's powers?

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INTRODUCTION

Respondents, Ohio prison officials ("Ohio"), agree with the Petitioner that the Court should grant certiorari here, so that the Court may review whether the prison-specific provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) violate the Establishment Clause. The circuits are squarely split on the question presented, and as the United States has noted in a similar pending case, the "conflict is mature and entrenched," and "[p]ostponing review is not likely to contribute to the reasoned resolution of the question presented." See Brief for the United States in *Bass v. Madison*, Case No. 03-1404 (petition pending). Indeed, just as Respondent Ohio acquiesces here, both of the *Bass* Respondents—the United States and the private plaintiff there—have likewise acquiesced in *Bass*. In sum, all of RLUIPA's defenders and antagonists, whether public or private, whether winners or losers below, are all of one voice on the need for some review in some case, and Ohio joins that chorus.

Because the case for review has been strongly made by others in this case and in *Bass*, Ohio's response here focuses on what it considers to be the real questions raised by this Petition: (1) should the Court grant certiorari in *this* case, even if it grants review in *Bass*, and (2) should the Court also review the parties' disagreement over several federalism issues concerning RLUIPA, such as Congress's power to enact RLUIPA under its Commerce Clause or Spending Clause powers, and whether RLUIPA violates the States' sovereignty and immunities under the Tenth and Eleventh Amendments? Ohio submits that the answer to each question, even considered separately, is yes. Considering them together, however, even more strongly demonstrates the need for broader review and the need to include this case in that review.

This case is a necessary vehicle for properly resolving any of the constitutional questions surrounding RLUIPA, even just the Establishment Clause question. That is because, as

explained below, the State of Virginia in *Bass* has adopted a theory of the Establishment Clause—a hybrid of federalist theory and Establishment Clause concepts—that differs from the traditional Establishment Clause position advanced by Ohio and adopted by the Sixth Circuit. Ohio suggests that the Court's full consideration of the Establishment Clause question is best served if both views are fully pressed by parties, and indeed, Ohio would advance both views if this Petition is granted. But while Ohio does not disagree with Virginia's view, Virginia expressly disclaims Ohio's position. Thus, if the Court grants certiorari in *Bass* only, it would cut off representation of the only view that has been adopted by any circuit court in striking RLUIPA. That seems a less-than-optimal approach to resolving the circuit split, given that the decision below, operating on Ohio's theory, is what drives the need for review to begin with.

Further, the Court should review not only the Establishment Clause issue(s), but it should also address whether RLUIPA is a valid exercise of Congress's powers under the Commerce and Spending Clauses and whether RLUIPA violates the Tenth and Eleventh Amendments. This is true for several independent reasons. One is that the law governing prisoners' Free Exercise claims has zigzagged over the years, even more so than in most areas of changing law, as Congress and the Court have now responded to each other several times in adjusting the standard of review that applies to such claims. Another is that the Court should avoid the very real possibility that, as explained below, piecemeal review of this statute could result in a situation in which the law is upheld and remains on the books, even if a majority of the Court—albeit on different grounds in different cases—finds the law unconstitutional.

If the Court agrees that full review is needed, so that the Court can address all of the constitutional clouds swirling around RLUIPA, then it surely should review this case, as *only* this case allows the Court to properly reach all of the federalism issues (under the Commerce and

Spending Clauses, and Tenth and Eleventh Amendments) regarding RLUIPA's (un)constitutionality. Because the Sixth Circuit struck RLUIPA in this case, Ohio, as Respondent, should be allowed to raise the federalism issues as valid alternate grounds for affirmance. By contrast, the State of Virginia is a Petitioner in *Bass*, and it seeks to raise those and other issues as alternate grounds for *reversal*. While Ohio supports Virginia's effort to have the entire law reviewed, it urges that only this case provides a proper vehicle to do so. Indeed, the United States agrees with us on that score, as it expressly acknowledged in its *Bass* acquiescence that only this case would properly raise the additional issues. We differ, though, with the federal government on this: what the United States sees as vice, we urge as virtue. They urge the Court to deny review here precisely to avoid the federalism issues, but again, such avoidance is ill-advised.

In sum, the Court ought to fully address the constitutional challenges to RLUIPA, and only this case allows it to do so. This Petition should be granted.

JURISDICTION

The district court actions giving rise to this petition were brought under 42 U.S.C. § 2000cc-1, so the district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court order at issue was entered on February 26, 2002, and the defendants below, the Respondents here, filed their notices of appeal in all three cases on March 1, 2002.

The court of appeals had jurisdiction on two separate grounds. First, the Defendants, all State officials, initially appealed (on March 1, 2002, as just noted) the denial of their claim of sovereign immunity. That provided appellate jurisdiction under the collateral order doctrine. In addition, the district court later certified the issues presented here for interlocutory review under 28 U.S.C. § 1292(b). As the Petition notes, it did so on August 4, 2003. The Respondents then timely petitioned the court of appeals to accept that alternate jurisdictional basis, and that petition was granted.

A panel of the U.S. Court of Appeals for the Sixth Circuit declared RLUIPA unconstitutional on November 7, 2003. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), Pet. App. A. The prisoner-plaintiffs, who are now Petitioners here, sought rehearing, as did the United States. Rehearing was denied on March 7, 2004.

Petitioners filed for certiorari on April 19, 2004, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition arises from three separate Free Exercise cases, brought by inmates professing several different religions. In one case, Petitioner Cutter professes to adhere to Satanism, and Petitioner Hampton is a Wiccan witch. In another, Petitioner Gerhardt professes the white-supremacist beliefs of the Church of Jesus Christ Christian. The third case was brought by a class of inmates, led by Petitioners Miller and Blankenship, all of whom claim to practice Odinism/Asatru, which is based on the Norse/Viking polytheistic tradition. In each case, the plaintiff(s) contested security measures that they claimed burdened their religious practices in violation of RLUIPA's prison provisions. Their cases were consolidated for the purpose of determining that statute's constitutionality. *Gerhardt v. Lazaroff*, 221 F. Supp.2d 827 (S.D. Ohio 2002) (district court opinion, incorporating Magistrate's Report and Recommendation) (also reproduced as Pet. App. B).

The defendant prison officials ("Ohio"), Respondents here, argued that RLUIPA violates the Establishment Clause because Congress's choice to significantly elevate religious prisoners' rights over those of their secular peers sends an unmistakable message of government endorsement of religion. Further, Ohio urged that RLUIPA's least-restrictive-means test imposes unconstitutional burdens on third parties, in violation of the principles recognized in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). Ohio also argued that RLUIPA's requirements were insufficiently related to any federal funds sent to Ohio's prisons, thus undercutting any reliance on the Spending Clause as a basis to impose RLUIPA here, or as a basis for overriding our Eleventh Amendment immunity from federal damages suits. Ohio also urged that the religious burdens did not have a sufficient impact on interstate commerce to justify application of the Act, and that even if such commercial effects were present, the means that

Congress chose to regulate those matters crossed the limits set by the Tenth Amendment. Ohio also argued that we were protected from suit by sovereign immunity, because the *Ex parte Young* fiction could not apply if RLUIPA was itself unconstitutional. That is, without a valid RLUIPA, there would be no underlying violation of federal law to separate state employees from their employer's sovereign immunity. Also, Ohio argued that our Eleventh Amendment was not waived by our purported acceptance of "related" federal funds under the Spending Clause, and of course the Commerce Clause provides no basis for overriding the Eleventh Amendment.

Ohio submitted a large body of evidence to support all of its arguments. Ohio produced affidavit and deposition testimony demonstrating the practical effect of the RFRA/RLUIPA standard on our prisons, including the ways it has motivated inmates to adopt religious postures to circumvent anti-gang measures, the resulting degradations of security, and the significant logistical problems that result when prison officials must evaluate myriad operational practices under a least-restrictive-means standard. Ohio also produced evidence of similar effects in other States' prison systems, including the results of a national survey on the topic.

Neither the prisoner-plaintiffs nor the United States, which intervened to defend RLUIPA's constitutionality, objected to or otherwise contested this evidence. Instead, they submitted their own evidence on other points, and stipulated on yet other points. And of course, they submitted arguments about the legal consequences of that evidence.

The District Court, adopting the Magistrate's Report and Recommendation, rejected the Establishment and Spending Clause challenges, along with the Tenth and Eleventh Amendment challenges. See *Gerhardt*, 221 F. Supp. 2d at 831-32, Pet. App. B at 4. The District Court found it unnecessary to reach the Commerce Clause issue. *Id.* at 832, Pet. App. B at 4.

The Ohio Defendants took a timely interlocutory appeal based on their sovereign immunity theory, which had the effect of bringing RLUIPA's substantive validity before the court of appeals through the collateral order doctrine. That jurisdictional basis was bolstered by the district court's certification of an interlocutory appeal under 28 U.S.C. § 1292 and the Sixth Circuit's acceptance of that certification. *Cutter*, 349 F.3d at 261, Pet. App. A at 3.

The Sixth Circuit held that RLUIPA violates the Establishment Clause because it has the effect of sending a message of government endorsement of religion. *Id.* at 264-68, Pet. App. A at 5-8. The court explained two bases for that holding. First, RLUIPA dramatically enhanced the rights of religious inmates relative to their identically-situated secular peers, allowing inmates who advance religion-based claims much greater chances of successfully compelling changes to institutional practices. *Id.* at 265-66, Pet. App. A at 6-7. Second, the extent of that preference encouraged inmates to become religious, or to pretend to, in order to enjoy those advantages. *Id.* at 266-67, Pet. App. A at 7.

The Sixth Circuit also held that RLUIPA's elevation of religious prisoners' rights was not a permissible burden-lifting accommodation under *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). That conclusion also had two bases. First, unlike the measure considered in *Amos*, RLUIPA was not necessary to avoid probable First Amendment violations. *Cutter*, 349 F.3d at 267, 268, Pet. App. A at 7, 8. Second, RLUIPA does not merely restore inmates to the status they enjoyed before the imposition of a governmental burden on religious exercise—which had been the effect of the law at issue in *Amos*—but instead, RLUIPA significantly increased inmates' rights beyond that baseline. *Id.*

The Petitioners and the United States each sought rehearing. The Sixth Circuit denied rehearing, and the private Petitioners filed the Petition.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari here to properly resolve the circuit split regarding RLUIPA's validity under the Establishment Clause.

Although the Ohio Respondents disagree with the Petitioners' ultimate merits analysis, we do agree on the two points relevant at this stage: that the Court should resolve the circuit split regarding RLUIPA's validity under the Establishment Clause, and that this case is a good vehicle to do so.

A. The Establishment Clause question is ripe for review.

All of the parties involved, in both this case and in *Bass*, agree that the Establishment Clause question, on which the circuits are split, is an issue that is ripe for the Court's review. See generally Petition; see also Petition (of Virginia) in *Bass v. Madison*, Case No. 03-1404 (petition pending); (Private) Respondent's Brief in Response in *Bass*; Brief for the United States ("U.S. *Bass* Br.") in *Bass*. As the United States summarized it, the "conflict is mature and entrenched," and "[p]ostponing review is not likely to contribute to the reasoned resolution of the question presented." See U.S. *Bass* Br. at 8.

Because those parties have explained the split, Ohio will not explain it at length again. The Sixth Circuit, in the decision below, held that RLUIPA's prison provisions violate the Establishment Clause, while the Fourth, Seventh and Ninth Circuits have rejected Establishment Clause challenges. *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003), cert. petition pending as *Bass v. Madison*, Case No. 03-1404; *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), cert. denied, 124 S. Ct. 66 (2003). And as both the Petition here and the decision below have noted, the split may be considered as even broader, as three other circuits—the Fifth, Eighth, and D.C. Circuits—have rejected similar Establishment Clause challenges to RLUIPA's predecessor statute, the Religious Freedom Restoration Act

(RFRA). See Petition at 7-8; *Cutter*, 349 F.3d at 261-62, Pet. App. A at 4 (explaining split); see *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996), rev'd on other grounds, 521 U.S. 507 (1998); *In re Young*, 141 F.3d 854, 863 (8th Cir. 1998); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996).

Moreover, the split is universally understood as a legal one, not a factual one, and the split is over both the conclusion regarding RLUIPA, and over several key legal principles. The Sixth Circuit found that RLUIPA has the forbidden effect of advancing religion, violating the second prong of the "*Lemon* test" established by *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As the Sixth Circuit explained, RLUIPA gives religious inmates an enhanced position relative to secular inmates who file otherwise-identical claims. *Cutter*, 349 F.3d at 266-67, Pet. App. A at 6. In *Boerne*, Justice Stevens had the same objection to RFRA. *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (Stevens, J., concurring) ("the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain."). But the other circuits have all expressly rejected this point about RLUIPA and *Lemon's* "effects" prong. See, *e.g.*, *Madison*, 355 F.3d at 318-319; *Mayweathers*, 314 F.3d at 1069.

Further, the Sixth and the other Circuits have also disagreed on whether RLUIPA is a permissible burden-lifting accommodation under *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). The Sixth Circuit reasoned that the statute upheld in *Amos*—one that grants religious groups an exception from Title VII's prohibition against religious discrimination—simply "lifted" a burden that the rest of Title VII would have otherwise imposed, leaving religious groups unaffected overall. *Cutter*, 349 F.3d at 267, 268, Pet. App. A at 7, 8. By contrast, RLUIPA went further, "by giving religious prisoners a preferred status in the prison community." *Cutter*, 349 F.3d at 267, Pet. App. at 7. But the other circuits have

expressly found that RLUIPA is the type of "burden-lifting" law that is allowed under *Amos*. See *Madison*, 355 F.3d at 317; *Charles*, 348 F.3d at 610; *Mayweathers*, 314 F.3d at 1068.

In sum, the Court should decide whether RLUIPA violates the Establishment Clause.

B. This case is needed to ensure full review of the Establishment Clause issue.

If the Court decides to review this important issue—as it should—then it should grant certiorari in *this* case to do so. Review in *Bass* alone would not be enough, for at least two reasons. First, Virginia expressly disclaims the Establishment Clause theory adopted by the Sixth Circuit and by the District Court in *Bass*. See Virginia's Petition in *Bass* ("Va. *Bass* Pet.") at 10-11; *Cutter*, 349 F.3d at 264-69, Pet. App. A at 5-8; *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003). Thus, Ohio is needed to fully represent the view that has created the split. Second, the record developed here is far more extensive than that in *Bass*, and that record illustrates the real-world effects of RLUIPA.

First, Virginia has explained that it does not intend to advance the view adopted by the Sixth Circuit, as it instead promotes a different Establishment Clause argument. See Va. *Bass* Pet. at 10-11 (rejecting view); *id.* at 11-15 (explaining federalist Establishment theory). Indeed, not only does Virginia plan to avoid advancing the Sixth Circuit's view, but Virginia goes a step further, as it openly criticizes that view as wrong. *Id.* at 10-11. In Virginia's view, RLUIPA does not violate the Establishment Clause under the *Lemon* test or under any variant theory that focuses on whether government (whether state or federal) has impermissibly advanced or endorsed religion. Instead, Virginia promotes a federalist view of the Establishment Clause, under which RLUIPA's substantive standard does not violate the Establishment Clause, but the problem is that *Congress* imposed the RLUIPA standard on the States. *Id.* at 11-15. Under that view, RLUIPA improperly invades the States' "authority to make policy choices in the 'play in

the joints' between what the Establishment Clause prohibits and what the Free Exercise Clause requires." *Id.* at 13, quoting *Locke v. Davey*, 124 S. Ct. 1307, 1307 (2004).[1]

Because Virginia will not provide the Court a full picture of the Establishment Clause issues here, Ohio's presence as a party is needed. That is not to say that Ohio disparages Virginia's federalist view; to the contrary, Ohio would advance it as one alternative here. But by limiting itself to that view and to the *Caldor* argument (see below at 11-12 and at n.1), Virginia will not provide the Court a full representation of one side of the debate. But the Court *should* have such a full representation at hand if it wishes to fully consider the issues here. Virginia suggests that the Sixth Circuit's "theory is available for this Court's consideration" if the Court reviews *Bass*, because the Court can review the decisions of the Sixth Circuit and of the Western District of Virginia. *Id.* at 11. But reading those opinions is not the same as having a party make the case. Indeed, such concerns frequently lead this Court to appoint counsel to represent a position, when a party indicates it will not defend a certain view defending or opposing the judgment below. See, *e.g.*, *Becker v. Montgomery*, 532 U.S. 757, 758 (2001) (noting that counsel "argued the case as amicus curiae in support of the judgment below, by invitation of the court."); *Alabama v. Shelton*, 535 U.S. 654, 656 (2002) (same, but with counsel opposing judgment below).

Here, the Court can avoid the likely need to appoint counsel in *Bass*, as the Court can and should grant review in this case, and Ohio will fill the role of advancing the Sixth Circuit's position against RLUIPA.

---

[1] Virginia, like Ohio, also advances the view that RLUIPA violates the Establishment Clause because it requires accommodations that impose burdens on third parties, in violation of *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985). Here, both prison officials and other prisoners are burdened when preferences are accorded to certain religious claimants.

Second, this case adds to the debate because it, unlike *Bass*, offers the Court a comprehensive record of the real-world effects of RLUIPA in prisons, such as the burdens that RLUIPA imposes upon prison officials and upon other inmates. The facts regarding burdens upon others is crucial, as both Ohio and Virginia seek to rely on *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), which concerned the effects of such burdens. Unlike *Amos*, which dealt with *lifting* burdens on those who seek religious accommodation, *Caldor* dealt with the problems that arise when an accommodation is achieved at the cost of *imposing* burdens upon others. See *id.* at 708-10. In *Caldor*, a Connecticut statute mandated that private employers could not require any employee to work on the particular day of the week that the employee identified as his Sabbath. *Id.* at 706. The Court found that this scheme violated the Establishment Clause, as it imposed a cost on the employers and on a claimant's fellow employees, who bore the brunt of the accommodation. *Id.* at 708-10.

Similarly, RLUIPA imposes burdens upon prison officials and upon inmates, who must face the security problems that result from RLUIPA's imposition—and the record here documents those problems. Ohio assembled a comprehensive record of how RLUIPA is used, like RFRA was before it, as a cover for advancing gang-related activities. That record includes the results of a national survey of the real-world impact of the RFRA/RLUIPA standard. And the Petitioners here vividly demonstrate how those whose agendas overlap with disruptive gang activity often invoke demands for religious freedom. For example, Plaintiff Gerhardt is a racial separatist, and no one doubts that racial strife is a problem in our prisons.

Indeed, the gang problem is a primary driver, as a practical matter, of the States' opposition to RLUIPA, as we States all see how RLUIPA hamstrings our efforts to combat prison gangs. See, *e.g.*, *Gerhardt*, 221 F. Supp.2d at 832-33 (denial of separate group services

for white supremacist inmates); *Marria v. Broaddus*, 200 F. Supp.2d 280 (S.D.N.Y. 2002) (challenging increased restrictions on inmates belonging to "religious" groups with a history of gang-affiliated violence); *Johnson v. Martin*, 2002 U.S. Dist. Lexis 19246 (W.D. Mich. 2002) (same).

While the record in this case thoroughly demonstrates the gang problems and other burdens imposed by RLUIPA, the *Bass* record is not nearly as complete. The *Bass* record is limited to a few facts about that particular case, involving one inmate in one prison, who insists on kosher food.

In sum, the Court should grant certiorari in this case, even if it wishes to review only the Establishment Clause question, as only Ohio will fully press the *legal* issues here, and only this case has a *factual* record sufficient to bring those legal issues to life.

II. The Court should review the other constitutional issues regarding RLUIPA's validity, such as challenges under the Spending and Commerce Clauses and the Tenth and Eleventh Amendments.

Ohio acknowledges that the circuits are not split on the federalism issues here, as they are on the Establishment Clause question. Nevertheless, Ohio urges the Court to review these additional issues both because the States need a definitive resolution to this ongoing debate and because piecemeal review could result in a scenario in which the law is upheld even if a majority of the Court concludes that it is unconstitutional. Further, as explained below, only *this* case would allow the Court to legitimately review all of the constitutional issues regarding RLUIPA, as the federalism challenges offer alternate grounds for affirming the Sixth Circuit's decision.

A. The Court should fully resolve RLUIPA's validity now, without allowing uncertainty to continue, and without allowing for inconsistent decisions by the Court.

The Court should resolve all of the questions regarding RLUIPA's constitutionality in one round of review, because deferring the federalism questions creates two independent problems. First, deferral will cause the States to live with years of harmful and unnecessary uncertainty, in an area that has already been marked for years by frequent swings in the law. Second, if the federalism issues are decided later, cut off from the Establishment Clause issues, such a scenario could easily lead to a bizarre result in which RLUIPA could be upheld even if a majority of the Court finds it unconstitutional, albeit on different grounds.

First, while continued uncertainty is often a hallmark of law, the dramatic swings in this particular area are notable. While prison officials must decide questions of religious accommodation every day, they have had to do so in a legal environment that has fluctuated wildly in the last decade. The controlling standard has swung, since 1993, back and forth between deferential rational-basis review, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), to

strict scrutiny and the least-restrictive-means test, "the most demanding test known to constitutional law," *Boerne*, 521 U.S. at 534. Congress passed RFRA in response to the Court's decision in *Employment Div., Dept. of Human Services v. Smith*, 494 U.S. 872 (1990), and after the Court invalidated RFRA in *City of Boerne*, Congress responded with RLUIPA. This legislative-judicial dialogue is, in many senses, a good thing, as each side of the debate represents a different branch doing its legitimate job. But no one can deny that the brunt of these changes in law is borne by the prison system.

This uncertainty costs more in the prison system than it might in other areas. "Running a prison is an inordinately difficult undertaking that requires," among other things, "planning and the commitment of resources." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Further, hard experience has taught that "[i]t is important to be consistent with the inmates" because "changing the rules constantly will actually precipitate problems." J. Katz, *Tips on Managing Inmates: The Tricks of the Trade*, Corrections Managers' Report, Vol. VII, No. 6 (April/May 2002) 83.

That uncertainty has very real consequences while it continues. Often, operational decisions, many with very high stakes, are driven by those legal standards. For example, States must combat prison gangs, and they try to do so by, among other things, prohibiting certain groups closely connected with gang activity and certain jewelry used as non-verbal identifiers. Such measures have been recognized as both effective and legal under constitutional standards. *Fraise v. Terhune*, 283 F.3d 506, 512-513 (3rd Cir. 2002) (upholding, as against constitutional challenges, ban on violent group); see *Alameen v. Coughlin*, 892 F. Supp. 440, 445-446, 450 (E.D.N.Y. 1995) (discussing compelling interest in ban on certain jewelry, which had been used as gang identifier). But officials cannot be sure whether they can continue to implement measures such as bans on known violent groups or on symbolic jewelry, because the

RFRA RLUIPA standard has forced their abandonment. *Marria v. Broaddus*, 2003 U.S. Dist. Lexis 13329 (S.D.N.Y. July 31, 2003) (invalidating, under RLUIPA, ban on the same violent group whose ban had been constitutionally upheld in *Fraise*); *Alameen*, 892 F. Supp. at 450 (invalidating jewelry ban, under RFRA, because State did not show that ban amounted to the least restrictive means to address compelling interest). Indeed, no one doubts that claims that would surely fail under the constitutional standard might meet more success, whether leading to ultimate victory or at least surviving dismissal to reach discovery, under RLUIPA. See *Murphy v. Missouri Dept. of Corrections*, 2004 U.S. App. Lexis 12239 (June 22, 2004) (affirming summary judgment against prisoner's Free Exercise claim, but reversing and remanding on identical claim under RLUIPA).

The only way to end this uncertainty, other than striking RLUIPA on Establishment Clause grounds (which Ohio of course urges), is for Court to rule on RLUIPA's validity under the Spending and Commerce Clauses and Tenth and Eleventh Amendments, if it determines that the Act satisfies the Establishment Clause. Otherwise, the uncertainty will continue until another case (or this case after remand) comes up from the circuits. "[P]rison officials, on the spot and with the responsibility for the safety of inmates and staff," *Wolff v. McDonell*, 418 U.S. 539, 566 (1974), simply do not have the luxury of waiting that long.

Second, if the Court waits to resolve the federalism issues, it faces the very real possibility that RLUIPA might be upheld even if, in the long run, a majority of the Court finds it unconstitutional. That odd result could occur in this way: If the Court reviews only the Establishment Clause issue now, it might sustain the law by, perhaps, a 6-3 vote. Then, in a few years, the Court might sustain the law against a Spending Clause challenge, again by a 6-3 vote—but with a different three Justices in dissent. At that point, a majority of six Justices will

have found the law unconstitutional, but the law will stand, as it will have separately withstood both challenges.

By contrast, if the Court hears the questions together, then the same voting lineup, if it occurs simultaneously in one case, would result in the law's invalidation. That is how it should be, if that is how the numbers add up. In fact, the Court frequently reaches a judgment for one side or another with no majority decision, with a judgment-based-majority comprised of markedly different opinions. Nothing is unusual about that, but there is something unusual—and, Ohio submits, undesirable—about allowing a different result to obtain because the decisions are split over the years. Many commentators have explained how such a scenario would be an internally irrational result. See, *e.g.*, F. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 814-20 (1982); E. Hartnett, *A Matter Of Judgment, Not A Matter Of Opinion*, 74 N.Y.U.L. Rev. 123, 140-42 (1999).

Indeed, Ohio stresses that it does not seek to "game the system" by combining the issues to more easily allow for an ultimate result in our favor. To the contrary, Ohio suggests that dividing the issues would amount to a breakdown of the system, even if unintended. To be sure, application of this line of reasoning should be limited, or parties could frequently supplement a certworthy issue with a series of tag-along issues. But here, even though the circuit courts have rejected the States' federalism-based challenges to RLUIPA, those challenges are surely substantial ones.

The United States, in its *Bass* acquiescence, offers several reasons why the Court should not consider the federalism issues, but those reasons are unpersuasive. First, the U.S. notes how those issues are not properly raised in *Bass*, U.S. *Bass* Br. at 11-12, but as explained in Part B below, that is not the case here. Second, the U.S. points to the lack of a circuit split on these

issues. *Id.* at 12-13. Ohio suggests, however, that the concerns raised above outweigh the lack of such a split. Third, the U.S. notes that the Court denied cert. in *Alameida v. Mayweathers*, 124 S. Ct. 66 (2003), and it asserts that Virginia "identif[ied] no intervening development that warrants a different outcome" in *Bass*. The intervening development, though, is the circuit split occasioned by this case, and again, that split on the Establishment issue makes it more sensible to now resolve these interrelated questions regarding RLUIPA's constitutionality as a whole.

Finally, the U.S. urges the Court to allow further percolation of the Spending Clause issue in light of the Court's recent decision in *Sabri v. United States*, 124 S. Ct. 1941 (2004), U.S. *Bass* Br. at 13, but as Virginia explained fully in its *Bass* reply brief, *Sabri* is irrelevant. In *Sabri*, a local official convicted of violating a federal bribery statute claimed that the statute was unconstitutional because it did not require proof of a link between the bribe itself and the federal fund received by the local government. Rejecting the official's attempted reliance on Spending Clause doctrine, the Court explained that such doctrine does not apply to direct federal regulation of individual behavior; instead, Spending Clause limits protect against Congress's use of its fiscal power as "a means for bringing federal economic might to bear on a State's own choices of public policy." *Sabri*, 124 S. Ct. at 1947-48.

In sum, the Court should review all of the issues related to RLUIPA's constitutionality—or, more important, RLUIPA's unconstitutionality. And as explained below, the Court should grant review in *this* case to do so.

B. This case is needed to properly reach the other questions about RLUIPA's validity.

If the Court does wish to reach the challenges to RLUIPA beyond the Establishment Clause—and it should, for the reasons above—then it should surely grant review here, as only this case will properly allow such full consideration of the issues.

As the United States explained in its *Bass* acquiescence, the different procedural posture here, relative to *Bass*, means that only this case raises the whole host of RLUIPA issues. U.S. *Bass* Br. at 10 n.8. That is because Ohio won below, so as Respondent here, it may therefore "rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 123, 137 n. 5 (1982). The United States urges that reality as a reason *not* to review the case, as it, not surprisingly given its desired outcome, seeks to avoid review of the federalism challenges to RLUIPA. After all, it has won those fights below, and it has no reason to risk a loss here. But given the practical reasons to hear those issues, as explained in Part A above, it seems hard to deny the need to grant this Petition as a means to do so.

Although Ohio agrees with Virginia that broader review is more appropriate, it reluctantly concludes that the United States has the better of the argument regarding the resulting scope of review, if review is limited to *Bass* alone. As the U.S. explains, the Court rarely, if ever, reviews non-jurisdictional issues that were not resolved below and are not alternate grounds for *affirmance*, as opposed to grounds for *reversal*. That is, the Court's usual practice is to not consider grounds not passed on below to *attack* a judgment, and Ohio understands that an exception is unlikely in *Bass*. But *Cutter* would allow the Court to reach all of these issues and ensure that all issues are resolved, but without departing from its usual practice.[2]

While this difference in posture is the primary—and in our view, sufficient—reason to review this case as a vehicle to examine the federalism issue, other reasons also militate in favor of this Petition as the better vehicle for resolving those issues. For example, just as the record here is more thorough on the Establishment Clause issues, see Part I-B above, so, too, is the

[2] Ohio notes that, while we ask the Court to conduct a broader legal review than that suggested by the Petition, we do not ask the Court to modify the judgment, which found RLUIPA unconstitutional. Thus, Ohio has not filed a cross-petition in this case. See *Blum*, 457 U.S. at 137 n. 5 (Respondents may "rely upon any matter appearing in the record in support of the judgment below.).

record more developed on the Spending and Commerce issues. Ohio submitted reams of evidence regarding every federal penny that goes to Ohio's prisons, and Ohio built a record showing how those funds are not related to the "burdens" on free exercise alleged here. On the other side, Plaintiffs-Petitioners here submitted much evidence purporting to show how Ohio's prisons affect interstate commerce. The *Cutter* Plaintiffs' efforts on the Commerce front stand in marked contrast to the approach taken by Plaintiff-Respondent Madison in *Bass*. That inmate insists that he has never relied on the Commerce Clause as a predicate for his RLUIPA claims, as he has relied solely on the Spending Clause instead. See (Private) Respondent's Brief in Response in *Bass*, Case No. 03-1404, at 9. Thus, along with the different procedural posture, the different records in *Bass* and *Cutter* show that this case is a superior vehicle for deciding the federalism challenges to RLUIPA.

In sum, just as this case adds a necessary dimension to the Court's review of the Establishment Clause question, this case is a truly indispensable part of any possible review of the federalism issues here.

* * *

In the final analysis, the case for reviewing RLUIPA is both clear and compelling. The need to include *Cutter* in that process is also pressing. *Cutter* is the only vehicle that would allow the Court to properly reach beyond the Establishment Clause, as both Ohio and Virginia have urged it to do. But, even if the Court decides to review RLUIPA solely on Establishment Clause grounds, *Cutter* is still a vital part of the puzzle, as only with *Cutter* will the Court be presented with the full Establishment Clause picture.

CONCLUSION

The Court should grant the Petition, and it should affirm the judgment below.

Respectfully submitted,

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July 19, 2004

No. 03-9877

(10)

DEC 20

In The
Supreme Court of the United States

JON B. CUTTER, et al.,

Petitioners,

vs.

REGINALD WILKINSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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Petition For Certiorari Filed April 19, 2004
Certiorari Granted October 12, 2004

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U.S. District Court
Southern District of Ohio (Columbus)
CIVIL DOCKET FOR CASE #: 2:98-cv-00275

Miller, et al v. Wilkinson,, et al

Date Filed: 03/12/98

* * *

Filing Date	#	Docket Text
03/14/2001	169	ORDER by Mag. Judge Terence P. Kemp granting motion to intervene by USA [168-1] (cc: all counsel) (no pgs: 3) (sh) (Entered: 03/15/2001)
		* * *
08/27/2001	211	REPORT AND RECOMMENDATION by Mag. Judge Terence P. Kemp that motion for partial dismissal be denied [134-1] NOTICE: Parties have 10 days to file objections (cc: all counsel) (no pgs: 43) (sh) (Entered: 08/28/2001)
		* * *
02/25/2002	245	ORDER by Judge Edmund A. Sargus Jr adopting motion REPORT AND RECOMMENDATION [211-1] (cc: all counsel) (no pgs: 6) (sh) (Entered: 02/26/2002)
		* * *
08/04/2003	282	ORDER by Judge Edmund A. Sargus Jr granting motion to certify 2/25/02 order for immediate appeal [279-1] (cc: all counsel) (no pgs: 3) (sh) (Entered: 08/07/2003)
		* * *

U.S. District Court
Southern District of Ohio (Columbus)
CIVIL DOCKET FOR CASE #: 2:97-cv-00382

Hampton, et al v. Wilkinson, et al

Date Filed: 04/03/97

* * *

Filing Date	#	Docket Text
03/14/2001	91	ORDER by Mag. Judge Mark R. Abel granting motion to intervene by USA (cc: all counsel) ( ) (bw) (Entered: 03/15/2001)
		* * *
08/27/2001	115	REPORT AND RECOMMENDATION by Mag. Judge Terence P. Kemp that motion to dismiss of the resp be be denied in part. [78-1] NOTICE: Parties have 10 days to file objections (cc: all counsel) (no pgs: 43) (bw) (Entered: 08/28/2001)
		* * *
02/25/2002	131	ORDER by Judge Edmund A. Sargus Jr adopting the Report and Recommendation and returning this matter to be docket of Judge Graham for all further proceedings. (cc: all counsel) (no pgs: 6) (bw) (Entered: 02/26/2002)
		* * *
08/04/2003	139	ORDER by Judge Edmund A. Sargus Jr granting motion for order certifying the order of 2-25-02 for immediate appeal [136-1] (cc: all counsel) (no pgs: 3) (sh) (Entered: 08/07/2003)
		* * *

U.S. District Court
Southern District of Ohio (Columbus)
CIVIL DOCKET FOR CASE #: 2:95-cv-00517

Gerhardt, et al v. Lazaroff, et al

Date Filed: 05/23/95

* * *

Filing Date	#	Docket Text
		* * *
03/14/2001	102	ORDER by Mag. Judge Terence P. Kemp granting motion to intervene [101-1] USA (cc: all counsel) (no pgs: 3) (sh) (Entered: 03/15/2001)
		* * *
08/27/2001	125	REPORT AND RECOMMENDATION by Mag. Judge Terence P. Kemp that motion for partial dismissal be denied
		* * *
02/25/2002	144	OPINION AND ORDER by Judge Edmund A. Sargus Jr denying motion do dismiss [131-1], denying motion to partial dismissal [128-1], adopting motion REPORT AND RECOMMENDATION [125-1], denying motion for partial dismiss [90-1] w/ the exception that plf claims asserted directly under the Ohio Constitution are DISMISSED (cc: all counsel) (no pgs: 6) (sh) (Entered: 02/26/2002)
		* * *

08/04/2003 151 ORDER by Judge Edmund A. Sargus Jr granting motion to certify 2/25/02 order for immediate appeal [148-1] (cc: all counsel) (no pgs: 3) (sh) (Entered: 08/07/2003)

* * *

US Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 02-3270, 02-3299, 02-3301

Cutter, et al v. Wilkinson, et al

Appeal from: Southern District of Ohio at Columbus

8/6/03 Joint Petition for Leave to Appeal for cases 02-3270; 02-3301; and 02-3299.

* * *

9/23/03 ORDER filed granting joint petition for leave to appeal

* * *

11/7/03 OPINION FILED: REVERSED and REMANDED;

11/7/03 JUDGMENT: REVERSED and REMANDED.

12/1/03 MANDATE ISSUED

* * *

12/16/03 ORDER filed to recall mandate

* * *

3/3/04 ORDER filed denying the petition for en banc rehearing

* * *

United States District Court
SOUTHERN DISTRICT OF OHIO
EASTERN DISTRICT

JOHN MILLER, ET AL.,
(*Enter above the full name of the plaintiff in this action*)

AND ALL OTHERS SIMILARLY SITUATED.

vs

Reginald Wilkinson	Class Action Lawsuit Pursuant to Federal Rules Civil Procedure 23.
David Schwarz	
Terry Collins	C2-98-275
Cheryl Hart	Judge [Illegible] Magistrate Judge ~~King~~ Kemp
Charles Griffin	

(*Enter above the full name of the defendant or defendants in this action*)

[Pro Se]

COMPLAINT

(Filed Mar. 12, 1998)

I. Previous Lawsuits.

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action otherwise relating to your imprisonment? Yes (x) No ( )

B. If your answer to A is yes, describe the lawsuit in the space below. (if there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.

1. Parties to this previous lawsuit

Plaintiffs In re: Name change of Darryl Blankenship

Defendants None

2. Court (if Federal court, name the District: if State Court, name the County)

Probate Court, Ross County, Ohio

3. Docket Number 97-CN-013

4. Name of Judge to whom case was assigned

Kellenberger

5. Disposition (for example, Was the case dismissed? Was it appealed? Is it still pending?

Dismissed

6. Approximate Date of Filing Lawsuit: 03-20-97

7. Approximate Date of Disposition: 06-01-97

8. Nature of Suit: Petition to Change Name For Religious Reasons.

B.II.

1. Parties to Previous Lawsuit.

Plaintiff: In re: Name Change of Rick Hall

Defendant: None

2. Court: Probate Court, Ross County, Ohio

3. Docket No.: 97-CN-016

4. Name of Judge to Whom Assigned: Kellenberger

5. Disposition Dismissed – Appealed on 06/25/97

6. Approximate Date of Filing Lawsuit: 04-01-97

7. Approximate Date of Disposition: 05-28-97

8. Nature of Suit: Petition to Change Name For Religious Reasons

9. Appealed to: Fourth District Court of Appeals Ross County, Ohio

10. Docket No. on Appeal: 97-CA-2305
11. Disposition on Appeal: _____

B.III.

1. Parties to Previous Lawsuit.

   Plaintiff: Rick Hall

   Defendant: Ross Correctional Institution
2. Court: Supreme Court of Ohio
3. Docket No.: 97-0741
4. Name of Judge to Whom Assigned: Moyer
5. Disposition: Dismissed – Premature (see Below)
6. Approximate Date of Filing Lawsuit: 04-14-97
7. Approximate Date of Disposition: 04-23-97
8. Nature of Suit: Mandamus/Prohibition on Right to Hair & Beard in Accordance with Religious Beliefs

B.IV.

1. Parties to Previous Lawsuit.

   Plaintiff: Rick Hall

   Defendant: Ross Correctional Institution
2. Court: Supreme Court of Ohio
3. Docket No.: 97-2037
4. Name of Judge to Whom Assigned: Moyer
5. Disposition: Dismissed
6. Approximate Date of Filing Lawsuit: 10-01-97
7. Approximate Date of Disposition: 12-10-97

8. Nature of Suit: Mandamus/Prohibition on Right to Hair & Beard in Accordance with Religious Beliefs

B.V.

1. Parties to Previous Lawsuit.

   Plaintiff: Jeffrey Holland

   Defendant: David Schwarz/Cheryl Hart/ Charles Griffin
2. Court: Supreme Court of Ohio
3. Docket No.: 97-2355
4. Name of Judge to Whom Assigned: Moyer
5. Disposition: Dismissed
6. Approximate Date of Filing Lawsuit: 11-12-97
7. Approximate Date of Disposition: 1-21-98
8. Nature of Suit: Mandamus to Compel Processing of Asatru Religious Accommodation requests/Appeal.

B.VI.

1. Parties to Previous Lawsuit.

   Plaintiff: David Dattilo

   Defendant: Ohio Dept. Rehabilitation & Corrections
2. Court: Supreme Court of Ohio
3. Docket No.: 97-2614
4. Name of Judge to Whom Assigned: Moyer
5. Disposition: Dismissed

6. Approximate Date of Filing Lawsuit: 12-15-97
7. Approximate Date of Disposition: 1-28-98
8. Nature of Suit: Mandamus to Compel Asatru Group Worship Services and Right to Hair and Beard in Accordance with Religious Beliefs

II. Place of present confinement Ross Correctional Inst. Chillicothe, Ohio.

A. Is there a prisoner grievance procedure in this institution? Yes (x) No ( )

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes (x) No ( )

C. If your answer is YES,

1. What steps did you take? Filed multiple letters, complaints, grievances and appeals from grievances. Grievance Nos. 4-97-14/6-97-1/7-97-14/7-97-19/7-97-20/9-97-10/9-97-11/11-97-13 and others

2. What was the result? Many grievances were not processed, others were dismissed without addressing their merits, others were simply denied. Denials were affirmed on appeal.

D. If you answer is NO, explain why not. N/A

E. If there is no prison grievance procedure in this institution, did you complain to the prison authorities? Yes (x) No ( )

F. If you answer is YES,

1. What steps did you take? Wrote many letters of complaint, and filed formal requests for Asatru religious accommodations and appealed therefrom

2. What was the result: Complaints ignored or advised to file additional complaints, religious accommodation requests and appeals therefrom were all denied

III. Parties

In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.

A. Name of Plaintiff John Miller #199-891
Address Ross Corr. Inst., P.O. Box 7010, Chillicothe, Ohio 45601

A.II. Name of Plaintiff Rick Hall (a.k.a. Raven McClowd) #277-848
Address Ross Corr. Inst., P.O. Box 7010, Chillicothe, Ohio 45601

A.III. Name of Plaintiff Jeffrey Holland (a.k.a. Thorvald Halland) #319-713
Address Ross Corr. Inst., P.O. Box 7010, Chillicothe, Ohio 45601

A.IV. Name of Plaintiff David Dattilo #301-729
Address Ross Corr. Inst., P.O. Box 7010, Chillicothe, Ohio 45601

A.V. Name of Plaintiff Roy Howington #315-531
Address Ross Corr. Inst., P.O. Box 7010, Chillicothe, Ohio 45601

A.VI. Name of Plaintiff Darryl Blankenship (Alfar Kynwulf) #295-771
Address Ross Corr. Inst., P.O. Box 7010, Chillicothe, Ohio 45601

A.VII. Name of Plaintiff Fred Schocke #285-016

Address Ross Corr. Inst., P.O. Box 7010, Chillicothe, Ohio 45601

A.VIII. Name of Plaintiff Matthew Stump #253-213

Address Ross Corr. Inst., P.O. Box 7010, Chillicothe, Ohio 45601

A.IX. Name of Plaintiff William Lemasters #276-290

Address Ross Corr. Inst., P.O. Box 7010, Chillicothe, Ohio 45601

A.X. Name of Plaintiff _____

Address _____

And all others similarly situated within Ohio Prisons

OTHER POSSIBLE PLAINTIFFS

Name: David Allen #309-572
Address: Madison Corr. Inst., P.O. Box 740, London, Ohio 43130

Name: Joseph Klinger #319-449
Address: Pickaway Corr. Inst., P.O. Box 209, Orient, Ohio 43146

Name: Jerry Rine #198-582
Address: Chillicothe Corr. Inst., P.O. Box 5500, Chillicothe, Ohio 45601

Name: Allen Semenchuk #156-157
Address: Mansfield Corr. Inst., P.O. Box 788, Mansfield, Ohio 44901

Name: Roy Slider #157-322
Address: S.O.C.F., P.O. Box 45699 Lucasville, Ohio 45699

In Item B below, place the full name of the Defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions and places of employment of any additional defendants.

B. Defendant Reginald Wilkinson is employed as Director of Ohio Dept. of Rehab. and Corr. at 1050 Freeway Drive North Columbus, Ohio 43229

C. Additional Defendants David Schwarz is employed as administrator of religious services for Ohio Dept. of Rehab. and Corr., at 1050 Freeway Drive North, Columbus, Ohio 43229.

D. Defendant Terry Collins
Is Employed As Warden of Ross Correctional Inst.
at P.O. Box 7010, Chillicothe, Ohio 45601

E. Defendant Cheryl Hart
Is Employed As Deputy Warden of Ross Corr. Inst.
at P.O. Box 7010, Chillicothe, Ohio 45601

F. Defendant Charles Griffen
Is Employed As Chaplain of Ross Correctional Inst.
at P.O. Box 7010, Chillicothe, Ohio 45601

IV. Statement of claim.

State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.

ALL PLAINTIFFS HEREIN ARE BELIEVERS IN THE ANCIENT TEUTONIC/NORSE RELIGION OF ASATRU. ASATRU IS ALSO KNOWN AS ODINISM,

VOR TRU, OR TROTH. PLAINTIFF BLANKENSHIP IS A RECOGNIZED MEMBER OF THE GOTHAR (PRIESTHOOD) OF THE ASATRU RELIGION BY THE ASATRU ALLIANCE OF KINDREDS IN VINLAND. ALL PLAINTIFFS ARE INCARCERATED WITHIN THE ROSS CORRECTIONAL INSTITUTION AT CHILLICOTHE, OHIO, BUT THEIR CLAIMS ARE SHARED BY INMATES THROUGHOUT OHIO PRISONS.

FROM APRIL, 1997 TO PRESENT, THE DEFENDANTS WHILE ACTING UNDER COLOR OF STATE LAW, IN THEIR INDIVIDUAL AND/OR OFFICIAL CAPACITIES, HAVE ACTTED WITH CALLUS AND DELIBERATE INDIFFERENCE TO PLAINTIFFS FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF RELIGION, AND FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION/TREATMENT, AND HAVE DISCRIMINATED AGAINST PLAINTIFFS BASED ON RACE AND RELIGION, CONTRARY TO THE FOURTEENTH AMENDMENT, BY THE FOLLOWING ACTS:

A.) DEFENDANTS GRIFFIN, SCHWARZ AND HART, ON NUMEROUS OCCASSIONS REFUSED TO ANSWER OR RESPOND TO LETTERS, COMPLAINTS, AND REQUESTS FOR ASATRU RELIGIOUS ACCOMMODATION AND APPEALS THEREFROM.

B.) DEFENDANTS GRIFFIN AND SCHWARZ HAVE REFUSED TO RESPOND TO COMPLAINTS CHARGING THEM WITH RELIGIOUS DISCRIMINATION.

C.) DEFENDANTS HART, COLLINS AND WILKINSON, HAVE FAILED, IN THEIR SUPERVISORY POSITIONS, TO CORRECT CONSTITUTIONAL DENIALS OF FREE EXERCISE OF RELIGION, EQUAL

PROTECTION, AND RELIGIOUS DISCRIMINATION WHEN THE ISSUES HAVE REPEATEDLY BEEN BROUGHT TO THEIR ATTENTION VIA LETTERS AND COMPLAINTS.

D.) DEFENDANTS DENY PLAINTIFFS THE RIGHT TO GROUP WORSHIP OR GROUP STUDY TIME, WHILE GRANTING THIS RIGHT TO INMATES OF OTHER RELIGIONS.

E.) DEFENDANTS REFUSE TO PROVIDE PLAINTIFFS WITH HOLY TEXTS OR RELIGIOUS MEDALLIONS FROM PUBLIC FUNDS, WHILE SO PROVIDING THESE ITEMS TO INMATES OF OTHER RELIGIONS.

F.) DEFENDANTS REFUSE TO HIRE AND ASATRU GOTHI (PRIEST) TO CONDUCT BLOTS (RELIGIOUS SERVICES), WHILE PROVIDING PRIEST FOR INMATES OF OTHER RELIGIONS.

G.) DEFENDANTS REFUSE TO ALLOW PLAINTIFFS TO HOLD THEIR OWN WORSHIP OR STUDY SERVICES IN THE ABSENCE OF A PRIEST, IN ACCORD WITH PLAINTIFFS RELIGIOUS BELIEFS.

H.) DEFENDANTS REFUSE TO ALLOW PLAINTIFFS WOODEN OR CERAMIC RUNES, YET ALLOW OTHER INMATES TO POSSESS DOMINO GAME PIECES. REFUSE TO PERMIT PLAINTIFFS DRINKING HORNS, YET PERMIT 5 BY 10 INCH WOODEN AND BRASS CHRISTIAN CRUCIFIX,. REFUSE TO PERMIT OTHER RELIGIOUS ITEMS SUCH AS STAFF AND SAX (CONSTRUCTED OF CARDBOARD), CANDLE, STATUES OF GODS, BLESSING TWIG, MEAD OR MEAD SUBSTITUTE, RITUAL BOWL, ALTAR OR ALTAR CLOTH.

I.) DEFENDANTS REFUSE TO RECOGNIZE ASATRU HOLY DAYS AND FEAST DAYS, YET

RECOGNIZE CHRISTIAN AND MUSLIM HOLY DAYS, FEASTS AND MONTH LONG RAMADAN.

J.) DEFENDANTS REFUSE TO ALLOW PLAINTIFFS TO SHAVE THEIR HEADS UPON HOLY OATHS, WHILE BLACK INMATES ARE NOT PUNISHED FOR SHAVING THEIR HEADS OR WEARING HAIR DISPROPORTIONATELY LONGER IN ONE AREA THAN ANOTHER, DESPITE PROHIBITION ON SAME.

K.) DEFENDANTS REFUSE TO ALLOW PLAINTIFFS TO GROW HAIR AND BEARD LONG IN ACCORDANCE WITH RELIGIOUS BELIEFS AND REQUIRE HAIRCUTS WHICH CONFLICT WITH RELIGIOUS BELIEFS, YET PERMIT INMATES OF NATIVE AMERICAN RELIGIONS TO GROW LONG HAIR. IN ADDITION, BLACK INMATES FREELY WEAR LONG HAIR IN BRAIDS OR PLAITS WITHOUT FEAR OF PUNISHMENT.

L.) DEFENDANTS REFUSE TO RECOGNIZE PLAINTIFFS BY THEIR RELIGIOUS NAMES.

M.) DEFENDANTS REFUSE TO PROVIDE PLAINTIFFS WITH CHAPEL SPACE OR OTHER ACCOMMODATIONS FOR WORSHIP OR STUDY.

N.) DEFENDANTS HAVE DENIED PLAINTIFF'S DUE PROCESS AND HAVE INTERFERED WITH PLAINTIFFS ACCESS TO THE COURT BY ATTEMPTING TO PROHIBIT PLAINTIFFS FROM EXHAUSTING ADMINISTRATIVE REMEDIES BY REFUSING TO PROCESS RELIGIOUS REQUESTS AND COMPLAINTS.

The specific acts by Plaintiffs/Defendants would include, but are by no means limited to the following:

I. **FACTS RELATING TO PLAINTIFF MILLER INCLUDE:**

1.) TWICE IN APRIL, 1997, MILLER WROTE DEFENDANT SCHWARZ TO REQUEST THE RIGHT TO SHAVE HIS HEAD PURSUANT TO A RELIGIOUS OATH. SCHWARZ DENIED BOTH REQUESTS.

2.) ON 7-1-97, MILLER FILED AN INFORMAL COMPLAINT WITH DEFENDANT SCHWARZ REQUESTING THE RIGHT TO WEAR HAIR AND BEARD IN ACCORDANCE WITH HIS RELIGIOUS BELIEF. SCHWARZ REFUSED TO RESPOND.

3.) ON 7-2-97, MILLER FILED AN INFORMAL COMPLAINT WITH DEFENDANT SCHWARZ REQUESTING RIGHT TO ASATRU RELIGIOUS SERVICES AND ASATRU PRIEST. SCHWARZ REFUSED TO RESPOND.

4.) ON OR ABOUT 7-29-97, MILLER FILED A GRIEVANCE WITH THE CHIEF INSPECTOR AGAINST DEFENDANT SCHWARZ FOR HIS REFUSAL TO RESPOND TO THE COMPLAINTS OF 7-1-97 AND 7-2-97. THE CHIEF INSPECTOR DISMISSED THE GRIEVANCE. EXHAUSTING THIS REMEDY.

5.) ON 11-1-97, MILLER FILED AN INFORMAL COMPLAINT WITH DEFENDANT SCHWARZ ON HIS FAILURE TO RESPOND TO THE COMPLAINTS OF 7-1-97 AND 7-2-97. SCHWARZ REFUSED TO RESPOND.

6.) ON 8-12-97, MILLER SUBMITTED TO DEFENDANT GRIFFIN A DRC POLICY 309-01 ASATRU RELIGIOUS ACCOMMODATION REQUEST, SEEKING ACCOMMODATION OF ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO PROCESS THIS FORM.

7.) ON 9-3-97, MILLER FILED WITH DEFENDANT HART A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. HART RETURNED THE FORM REFUSING TO PROCESS IT.

8.) ON 9-19-97, MILLER SUBMITTED TO DEFENDANT GRIFFIN ANOTHER DRC POLICY 39-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. AGAIN GRIFFIN FAILED TO PROCESS SAME.

9.) ON 11-1-97, MILLER FILED AN INFORMAL COMPLAINT WITH DEFENDANT GRIFFIN ON HIS REFUSAL TO PROCESS DRC POLICY 309-01 FORMS REQUESTING ASATRU RELIGIOUS ACCOMMODATION. GRIFFIN REFUSED TO RESPOND.

10.) ON 11-3-97, MILLER EXHAUSTED ALL ADMINISTRATIVE REMEDIES ON ASATRU RELIGIOUS ACCOMMODATION BY FILING A DRC POLICY 309-01 APPEAL TO DEFENDANT SCWARZ. ON 12-4-97, MILLER RECEIVED THE ANSWER TO HIS APPEAL FROM SCHWARZ, WHICH WAS DATED 11-21-97, IN WHICH SCHWARZ REFUSED TO ACCOMMODATE THE ASATRU RELIGION OR PRACTICES.

11.) ON 11-5-97, MILLER SENT A LETTER TO MR. ERIC DAHLBERG, REGIONAL DIRECTOR OF OHIO DEPT. OF REHAB. AND CORR. ASKING FOR ASSISTANCE IN HAVING ASATRU ACCOMMODATED WITHIN THE OHIO PRISON SYSTEM AND INFORMING HIM OF THE DIFFICULTIES IN HAVING ASATRU RELIGIOUS REQUESTS PROCESSED. A COPY OF THIS LETTER WAS SERVED UPON DEFENDANT WILKINSON. NO REPLY HAS BEEN RECEIVED.

12.) ON 12-3-97, MILLER FILED A GRIEVANCE WITH THE CHIEF INSPECTOR AT CENTRAL OFFICE, FURTHER EXHAUSTING ALL ADMINISTRATIVE REMEDIES, ALLEGING DISCRIMINATION ON REPEATED FAILURES TO PROCESS ASATRU RELIGIOUS REQUESTS, AND ASKING THAT THE ASATRU RELIGION AND PRACTICES BE ACCOMMODATED. THE CHIEF INSPECTOR. ON 12-17-97, REFUSED TO PROCESS THE APPEAL/GRIEVANCE, CALLING IT "NOT GRIEVABLE".

II: <u>FACTS RELATING TO PLAINTIFF HALL INCLUDE:</u>

1.) ON 4-10-97, HALL WROTE DEFENDANTS GRIFFIN AND SCHWARZ REQUESTING ACCOMMODATION OF ASATRU RELIGION, RECOGNITION OF RELIGIOUS NAME, AND RIGHT TO HAIR AND BEARD IN ACCORDANCE WITH RELIGIOUS BELIEFS, AND RIGHT TO POSSESS RELIGIOUS ITEMS. GRIFFIN FAILED TO ANSWER, BUT ON 4-29-97 SCHWARZ DENIED ALL RELIGIOUS REQUESTS.

2.) ON 7-7-97, HALL SUBMITTED AN INFORMAL COMPLAINT TO DEFENDANT SCHWARZ REQUESTING THE RIGHT OT WEAR HAIR AND BEARD IN ACCORD WITH HIS RELIGIOUS BELIEFS. SCHWARZ REFUSED TO REPLY. ON 7-24-97, HALL FILED A GRIEVANCE ON THIS MATTER. ON 8-16-97, THE GRIEVANCE WAS DENIED. ON 8-19-97, HALL EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY APPEALING TO THE CHIEF INSPECTOR. ON 9-15-97, THE CHIEF INSPECTOR AFFIRMED THE DENIAL (GRIEVANCE NO. 7-97-14).

3.) ON 6-19-97, HALL FILED AN INFORMAL COMPLAINT WITH DEFENDANT SCHWARZ REQUESTING AN ASATRU PRIEST AND RELIGIOUS ACCOMMODATION. SCHWARZ FAILED TO RESPOND. ON 8-26-97, HALL FILED A GRIEVANCE ON THIS MATTER. ON 9-13-97, THE GRIEVANCE WAS DENIED AND HALL WAS GIVEN A DIRECT ORDER TO FILE NO MORE GRIEVANCES. ON 9-15-97, HALL EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY APPEALING TO THE CHIEF INSPECTOR. ON 10-20-97, THE CHIEF INSPECTOR AFFIRMED THE DENIAL (GRIEVANCE NO. 9-97-11).

4.) ON 7-30-97, HALL SUBMITTED TO DEFENDANT SCHARZ AN INFORMAL COMPLAINT ALLEGING DISCRIMINATION FOR HIS FAILURE TO REPLY TO THE PRIOR COMPLAINTS OF 6-19-97 AND 7-7-97. SCHWARZ AGAIN FAILED TO ANSWER OR RESPOND. ON 8-25-97, HALL FILED A GRIEVANCE ON THIS ACT OF DISCRIMINATION. ON 9-13-97 THE GRIEVANCE WAS DENIED AND HALL WAS GIVEN A DIRECT ORDER TO FILE NO MORE GRIEVANCES. ON 9-15-97, HALL EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY APPEALING TO THE CHIEF INSPECTOR. ON 10-20-97, THE CHIEF INSPECTOR AFFIRMED THE DENIAL (GRIEVANCE NO. 9-97-10).

5.) ON 7-28-97 AND 8-25-97, HALL FILED INFORMAL COMPLAINTS WITH DEFENDANT HART, EXPLAINING THE INADEQUACY OF THE GRIEVANCE PROCEDURE AND ASKED HER ASSISTANCE IN OBTAINING REPLIES TO RELIGIOUS ISSUES. HART FAILED TO INTERVENE.

6.) ON 8-18-97, HALL FILED A COMPLAINT WITH THE CORRECTIONAL INSTITUTION INSPECTION COMMITTEE ON THE INSTITUTIONS REPEATED FAILURE TO PROCESS ASATRU RELIGIOUS REQUESTS. A COPY OF THIS COMPLAINT WAS SERVED UPON DEFENDANT WILKINSON. NO REPLY WAS RECEIVED.

7.) ON 8-4-97, HALL FILED WITH DEFENDANT GRIFFIN A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO PROCESS SAME.

8.) ON 9-1-97, HALL SUBMITTED TO DEFENDANT HART A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. HART RETURNED THE FORM REFUSING TO PROCESS SAME.

9.) ON 9-8-97, HALL SUBMITTED TO DEFENDANT GRIFFIN ANOTHER DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO TIMELY ANSWER.

10.) ON 10-9-97, HALL EXHAUSTED ADMINISTRATIVE REMEDIES BY FILING A DRC POLICY 309-01 APPEAL WITH DEFENDANT SCHWARZ, EXPLAINING THAT HART AND GRIFFIN HAD REFUSED TO PROCESS DRC POLICY 309-01 REQUESTS, AND ASKING THAT THE ASATRU RELIGION AND PRACTICES BE ACCOMMODATED. SCHWARZ FAILED TO PROCESS THIS APPEAL. TO FURTHER EXHAUST ADMINISTRATIVE REMEDIES, HALL, ON 11-21-97, FILED WITH THE CHIEF INSPECTOR A GRIEVANCE CHARGING RELIGIOUS DISCRIMINATION AGAINST SCHWARZ FOR REFUSING TO PROCESS THE DRC

POLICY 309-01 APPEAL, AND ASKING THAT THE ASATRU RELIGION AND PRACTICES BE ACCOMMODATED. ON 12-4-97, THE CHIEF INSPECTOR REFUSED TO PROCESS THE GRIEVANCE BY STATING THE ISSUES WERE "NOT GRIEVABLE".

11.) ON 10-14-97, HALL SUBMITTED AN INFORMAL COMPLAINT TO DEFENDANT GRIFFIN CHARGING HIM WITH RELIGIOUS DISCRIMINATION FOR FAILING TO ANSWER OR RESPOND TO ASATRU RELIGIOUS REQUESTS/ COMPLAINTS. GRIFFIN FAILED TO ANSWER. ON 11-1-97, HALL FILED A GRIEVANCE ON THIS MATTER. ON 11-13-97, THE GRIEVANCE WAS DENIED, HALL EXHAUSTED ALL ADMINISTRATIVE REMEDIES ON 11-17-97, BY APPEALING TO THE CHIEF INSPECTOR. THE CHIEF INSPECTOR, ON 12-17-97, AFFIRMED THE DECISION OF THE INSTITUTIONAL INSPECTOR ON THIS MATTER (GRIEVANCE NO. 11-97-12).

12.) ON 10-27-97, HALL FILED AN INFORMAL COMPLAINT WITH DEFENDANT HART, COMPLAINING OF THE REPEATED FAILURES TO PROCESS ASATRU RELIGIOUS REQUESTS/ COMPLAINTS. ON 10-31-97, HART RESPONDED STATING THE INSTITUTION WOULD NO LONGER INVOLVE ITSELF IN ASATRU RELIGIOUS REQUESTS.

13.) ON 9-17-97, HALL SERVED A LETTER UPON DEFENDANT COLLINS ASKING WHY ASATRU RELIGIOUS REQUESTS/COMPLAINTS WERE NOT BEING ANSWERED. ON 10-1-97, DEFENDANT HART ANSWERED FOR COLLINS STATING DOCUMENTS WERE BEING PROCESSED.

14.) ON 12-3-97, HALL WAS CALLED TO SPEAK WITH INSTITUTIONAL INSPECTOR WILLIAM McGINNIS. McGINNIS DELIVERED TO HALL THE ANSWER OF GRIFFIN AND COLLINS TO HALL'S 9-8-97, DRC POLICY 309-01 REQUEST FOR ASATRU RELIGIOUS ACCOMMODATION. ON 11-13-97, GRIFFIN AND COLLINS DENIED ALL REQUEST FOR ASATRU RELIGIOUS ACCOMMODATION. ON 12-3-97, HALL EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY FILING HIS DRC POLICY 309-01 APPEAL WITH DEFENDANT SCHWARZ. SCHWARZ, ON JANUARY 7, 1998, DISMISSED THE APPEAL AND DENIED ALL RELIGIOUS REQUESTS. TO FURTHER EXHAUST ADMINISTRATIVE REMEDIES, HALL, ON 1-12-98 FILED A GRIEVANCE WITH THE CHIEF INSPECTOR. THE CHIEF INSPECTOR, ON 2-6-98, DISMISSED THE GRIEVANCE (GRIEVANCE NO. CI-98-39).

III: **FACTS RELATING TO PLAINTIFF HOLLAND INCLUDE:**

1.) ON 8-22-97, HOLLAND SUBMITTED TO DEFENDANT HART AN INFORMAL COMPLAINT REQUESTING THAT THE ASATRU RELIGION BE ACCOMMODATED. ON 8-27-97, HART RESPONDED INFORMING HOLLAND TO CONTACT THE CHAPLAIN.

2.) ON 8-5-97, HOLLAND SUBMITTED TO DEFENDANT GRIFFIN A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO PROCESS SAME.

3.) ON 8-30-97, HOLLAND SUBMITTED TO DEFENDANT HART A DRC POLICY 309-01 FORM

REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. HART RETURNED THE FORM REFUSING TO PROCESS SAME.

4.) ON 9-10-97, HOLLAND SUBMITTED TO DEFENDANT GRIFFIN ANOTHER DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO TIMELY ANSWER OR RESPOND.

5.) ON 10-9-97, HOLLAND EXHAUSTED ADMINISTRATIVE REMEDIES BY FILING A DRC POLICY 309-01 APPEAL WITH DEFENDANT SCHWARZ, EXPLAINING THAT HART AND GRIFFIN HAD REFUSED TO PROCESS DRC POLICY 309-01 REQUESTS, AND ASKING THAT THE ASATRU RELIGION AND PRACTICES BY ACCOMMODATED. SCHWARZ FAILED TO TIMELY PROCESS THIS APPEAL. TO FURTHER EXHAUST ALL ADMINISTRATIVE REMEDIES, HOLLAND, ON 11-21-97, FILED WITH THE CHIEF INSPECTOR A GRIEVANCE CHARGING RELIGIOUS DISCRIMINATION AGAINST SCHWARZ FOR REFUSING TO PROCESS THE DRC POLICY 309-01 APPEAL, AND ASKING THAT THE ASATRU RELIGION AND PRACTICES BE ACCOMMODATED. ON 12-4-97, THE CHIEF INSPECTOR REFUSED TO PROCESS THE GRIEVANCE BY STATING THE ISSUES WERE "NOT GRIEVABLE".

6.) ON 8-15-97, HOLLAND SUBMITTED TO DEFENDANT SCHWARZ AN INFORMAL COMPLAINT ASKING FOR ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. SCHWARZ FAILED TO RESPOND.

7.) ON 10-14-97, HOLLAND SUBMITTED TO DEFENDANT GRIFFIN COMPLAINT CHARGING

HIM WITH RELIGIOUS DISCRIMINATION FOR REPEATEDLY FAILING TO RESPOND TO ASATRU RELIGIOUS REQUESTS. GRIFFIN FAILED TO RESPOND. ON 11-1-97, HOLLAND FILED A GRIEVANCE ON THIS MATTER. ON 11-13-97, THE GRIEVANCE WAS DENIED. HOLLAND EXHAUSTED ALL ADMINISTRATIVE REMEDIES ON 11-17-97, BY APPEALING TO THE CHIEF INSPECTOR. THE CHIEF INSPECTOR, ON 12-17-97, AFFIRMED DENIAL OF GRIEVANCE (GRIEVANCE NO. 11-97-11).

8.) ON 10-27-97, HOLLAND SUBMITTED TO DEFENDANT HART AN INFORMAL COMPLAINT ON THE REPEATED FAILURES TO PROCESS ASATRU RELIGIOUS REQUESTS. ON 10-30-97, HART RESPONDED STATING THE INSTITUTION WOULD NO LONGER INVOLVE ITSELF WITH ASATRU RELIGIOUS REQUESTS.

9.) ON 12-3-97, HOLLAND WAS CONTACTED BY WILLIAM McGINNIS, THE INSTITUTIONAL INSPECTOR, WHO DELIVERED TO HOLLAND THE BELATED ANSWER BY DEFENDANTS GRIFFIN AND COLLINS TO HOLLAND'S 9-10-97 DRC POLICY 309-01 REQUEST FOR ACCOMMODATION OF ASATRU RELIGION AND PRACTICES. ON 11-13-97, GRIFFIN AND COLLINS HAD DENIED ALL ASATRU RELIGIOUS REQUESTS. TO EXHAUST ADMINISTRATIVE REMEDIES, ON 12-3-97, HOLLAND SUBMITTED TO DEFENDANT SCHWARZ A DRC POLICY 309-01 APPEAL SEEKING ACCOMMODATION OF THE ASATRU RELIGION. SCHWARZ DENIED THE APPEAL ON 1-7-98, HOLLAND, ON 1-12-98, FILED A GRIEVANCE TO THE CHIEF INSPECTOR. THE CHIEF INSPECTOR, ON 2-6-98, DENIED THE GRIEVANCE (GRIEVANCE NO. CI-98-38).

10.) ON 12-11-97, HOLLAND RECEIVED FROM DEFENDANT SCHWARZ A BELATED REPLY TO HIS 10-9-97 DRC POLICY 309-01 APPEAL. ON 11-24-97, SCHWARZ HAD DENIED THE APPEAL AND REFUSED TO MAKE ANY ACCOMMODATIONS FOR ASATRU RELIGION AND PRACTICES. HOLLAND EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY FILING A GRIEVANCE ON THIS DENIAL TO THE CHIEF INSPECTOR ON 12-19-97. THE CHIEF INSPECTOR, ON 2-6-98, DENIED THE GRIEVANCE (CONSOLIDATED WITH 1-12-98 GRIEVANCE ABOVE STATING THIS WAS A MATTER FOR THE COURTS TO DECIDE. (GRIEVANCE NO. CI-98-38).

IV: <u>FACTS RELATING TO PLAINTIFF DATTILO INCLUDE:</u>

1.) ON 8-22-97, DATTILO SUBMITTED TO DEFENDANT HART AN INFORMAL COMPLAINT SEEKING RECOGNITION OF THE ASATRU RELIGION. ON 8-29-97, HART REPLIED INFORMING DATTILO TO CONTACT CHAPLAIN.

2.) ON 8-5-97, DATTILO SUBMITTED TO DEFENDANT GRIFFIN A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO PROCESS SAME.

3.) ON 8-30-97, DATTILO SUBMITTED TO DEFENDANT HART A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. HART RETURNED THE FORM REFUSING TO PROCESS SAME.

4.) ON 9-12-97, DATTILO SUBMITTED TO DEFENDANT GRIFFIN ANOTHER DRC POLICY

309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. AGAIN GRIFFIN FAILED TO PROCESS THIS FORM.

5.) ON 10-14-97, DATTILO EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY SUBMITTING A DRC POLICY 309-01 APPEAL TO DEFENDANT SCHWARZ. SCHWARZ FAILED TO PROCESS THE APPEAL. TO FURTHER EXHAUST ADMINISTRATIVE REMEDIES, DATTILO, ON 11-21-97, FILED A GRIEVANCE WITH THE CHIEF INSPECTOR ALLEGING RELIGIOUS DISCRIMINATION FOR FAILURE TO PROCESS ASATRU RELIGIOUS ACCOMMODATION REQUESTS, AND ASKING THAT THE ASATRU RELIGION AND PRACTICES BE ACCOMMODATED. ON 12-4-97, THE CHIEF INSPECTOR REFUSED TO PROCESS THE GRIEVANCE CLAIMING THE ISSUES WERE "NOT GRIEVABLE".

6.) ON 10-15-97, DATTILO SUBMITTED TO DEFENDANT GRIFFIN AN INFORMAL COMPLAINT CHARGING RELIGIOUS DISCRIMINATION FOR HIS FAILURE TO PROCESS ASATRU RELIGIOUS ACCOMMODATION REQUESTS. GRIFFIN FAILED TO ANSWER OR RESPOND.

7.) ON 10-27-97, DATTILO SUBMITTED TO DEFENDANT HART AN INFORMAL COMPLAINT ON THE REPEATED FAILURE TO PROCESS ASATRU RELIGIOUS REQUESTS. ON 10-31-97, HART REPLIED STATING THE INSTITUTION WOULD NO LONGER INVOLVE ITSELF WITH ASATRU RELIGIOUS REQUESTS.

V: FACTS RELATING TO PLAINTIFF HOWINGTON INCLUDE:

1.) ON 8-7-97, HOWINGTON SUBMITTED TO DEFENDANT GRIFFIN A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO PROCESS SAME.

2.) ON 8-31-97, HOWINGTON SUBMITTED TO DEFENDANT HART A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. HART RETURNED THE FORM REFUSING TO PROCESS SAME.

3.) ON 9-8-97, HOWINGTON SUBMITTED TO DEFENDANT GRIFFIN ANOTHER DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO TIMELY PROCESS SAME.

4.) ON 10-14-97, HOWINGTON SUBMITTED TO DEFENDANT GRIFFIN AN INFORMAL COMPLAINT CHARGING RELIGIOUS DISCRIMINATION ON HIS REPEATED FAILURE TO PROCESS ASATRU RELIGIOUS REQUESTS. GRIFFIN FAILED TO RESPOND TO SAME.

5.) ON 10-27-97, HOWINGTON SUBMITTED TO DEFENDANT HART AN INFORMAL COMPLAINT ON THE REPEATED FAILURE TO PROCESS ASATRU RELIGIOUS REQUESTS. ON 10-31-97, HART RESPONDED STATING THE INSTITUTION WOULD NO LONGER INVOLVE ITSELF WITH ASATRU RELIGIOUS REQUESTS.

6.) ON 10-9-97, HOWINGTON EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY SUBMITTING TO DEFENDANT SCHWARZ A DRC POLICY 309-01 APPEAL, COMPLAINING OF THE FAILURE

TO PROCESS DRC POLICY 309-01 FORMS AT THE INSTITUTIONAL LEVEL, AND REQUESTING THAT THE ASATRU RELIGION AND PRACTICES BE ACCOMMODATED. SCHWARZ FAILED TO PROCESS THE APPEAL. TO FURTHER EXHAUST ADMINISTRATIVE REMEDIES, HOWINGTON, ON 11-21-97, SUBMITTED TO THE CHIEF INSPECTOR A GRIEVANCE ALLEGING RELIGIOUS DISCRIMINATION FOR FAILURE TO PROCESS ASATRU RELIGIOUS REQUESTS, AND ASKING THAT ASATRU RELIGION AND PRACTICES BE ACCOMMODATED. THE CHIEF INSPECTOR FAILED TO REPLY.

7.) ON 12-3-97, HOWINGTON WAS CONTACTED BY WILLIAM McGINNIS, THE INSPECTOR OF INSTITUTION SERVICES, WHO DELIVERED TO HOWINGTON THE BELATED DECISION OF DEFENDANTS GRIFFIN AND COLLINS TO HIS 9-8-97 DRC POLICY 309-01 REQUEST FOR ASATRU RELIGIOUS ACCOMMODATION. ON 11-13-97, GRIFFIN AND COLLINS HAD DENIED ALL ASATRU RELIGIOUS REQUEST. ON 12-3-97, HOWINGTON EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY SUBMITTING TO DEFENDANT SCHWARZ A DRC POLICY 309-01 APPEAL SEEKING ASATRU RELIGIOUS ACCOMMODATION. SCHWARZ FAILED TO ANSWER OR RESPOND.

VI: FACTS RELATING TO PLAINTIFF BLANKENSHIP INCLUDE:

1.) ON 4-10-97, BLANKENSHIP SUBMITTED TO DEFENDANTS GRIFFIN AND SCHWARZ A REQUEST FOR RECOGNITION OF THE ASATRU RELIGION AND PRACTICES, INCLUDING

GROUP WORSHIP, RECOGNITION OF RELIGIOUS NAMES, RIGHT TO RELIGIOUS MEDALLION AND RITUAL ITEMS, AND RIGHT TO HAIR AND BEARD IN ACCORDANCE WITH RELIGIOUS BELIEFS. GRIFFIN FAILED TO RESPOND, BUT ON 4-29-97, SCHWARZ DENIED ALL REQUESTS AND IMPLIED THAT DISCIPLINARY ACTION COULD BE TAKEN AGAINST BLANKENSHIP.

2.) ON 5-10-97, BLANKENSHIP SUBMITTED TO SCHWARZ ANOTHER REQUEST FOR ACCOMMODATION OF ASATRU RELIGION AND ASKING THAT AN ASATRU PRIEST BE HIRED. SCHWARZ FAILED TO REPLY. ON 6-6-97 AND 6-16-97, BLANKENSHIP WROTE SCHWARZ TO REQUEST A REPLY TO HIS 5-10-97 REQUEST. BLANKENSHIP SERVED COPIES OF THESE LETTERS TO DEFENDANT WILKINSON. AGAIN NO REPLY WAS RECEIVED. ON 6-20-97, BLANKENSHIP SUBMITTED TO DEFENDANT SCHWARZ AN INFORMAL COMPLAINT REQUESTING THE ACCOMMODATION OF ASATRU RELIGION, PRIEST, GROUP WORSHIP, TEXT AND MEDALLIONS, AND RELIGIOUS HOLIDAYS, SCHWARZ FAILED TO REPLY, ON 7-7-97, BLANKENSHIP FILED A GRIEVANCE ON THIS MATTER. ON 7-11-97, THE GRIEVANCE WAS RETURNED BY THE INSPECTOR STATING THAT HE HAD TALKED TO SCHWARZ AND SCHWARZ WOULD BE ANSWERING THE COMPLAINT THAT WEEK, AND ADVISING BLANKENSHIP TO RESUBMIT THE GRIEVANCE AFTER RECEIVING SCHWARZ REPLY. SCHWARZ FAILED TO SO REPLY, AND ON JULY 25, 1997, BLANKENSHIP RESUBMITTED THE GRIEVANCE. ON 8-28-97 THE GRIEVANCE WAS DENIED. ON THE GRIEVANCE DISPOSITION BLANKENSHIP WAS TOLD TO NOT SUBMIT ANY MORE GRIEVANCES. ON 8-29-97,

BLANKENSHIP EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY APPEALING TO THE CHIEF INSPECTOR. THE CHIEF INSPECTOR, ON 10-6-97 AFFIRMED THE DENIAL (GRIEVANCE NO. 7-97-20).

3.) ON 7-31-97, BLANKENSHIP SUBMITTED AN INFORMAL COMPLAINT UPON DEFENDANT SCHWARZ ALLEGING RELIGIOUS DISCRIMINATION ON HIS FAILURE TO REPLY TO ASATRU RELIGIOUS REQUESTS. SCHWARZ FAILED TO RESPOND. ON 8-25-97, BLANKENSHIP FILED A GRIEVANCE ON THIS MATTER. ON 8-28-97, THE GRIEVANCE WAS DENIED AND BLANKENSHIP WAS ORDERED TO FILE NO MORE GRIEVANCES. ON 8-29-97, BLANKENSHIP EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY APPEALING TO THE CHIEF INSPECTOR. THE CHIEF INSPECTOR, ON 10-6-97 AFFIRMED THE DENIAL (GRIEVANCE NO. 7-97-19).

4.) ON 5-2-97, BLANKENSHIP SUBMITTED TO DEFENDANT GRIFFIN AN INFORMAL COMPLAINT REQUESTING RECOGNITION OF HIS RELIGIOUS NAME. GRIFFIN FAILED TO RESPOND. ON 5-12-97, BLANKENSHIP SUBMITTED TO GRIFFIN A SECOND INFORMAL COMPLAINT REQUESTING RECOGNITION OF HIS RELIGIOUS NAME. AGAIN GRIFFIN FAILED TO RESPOND. ON 5-23-97, BLANKENSHIP FILED A GRIEVANCE ON THIS MATTER. ON 6-4-97 THE GRIEVANCE WAS DISMISSED. ON 6-5-97, BLANKENSHIP EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY APPEALING TO THE CHIEF INSPECTOR, THE CHIEF INSPECTOR, ON 7-7-97 AFFIRMED THE DISMISSAL (GRIEVANCE NO. 6-97-1).

5.) ON 6-25-97, BLANKENSHIP SUBMITTED TO DEFENDANT SCHWARZ AN INFORMAL

COMPLAINT REQUESTING THE RIGHT TO WEAR HAIR AND BEARD IN ACCORDANCE WITH HIS RELIGIOUS BELIEFS. SCHWARZ FAILED TO REPLY. ON 7-25-97, BLANKENSHIP FILED A GRIEVANCE ON THIS MATTER. ON 8-16-97 THE GRIEVANCE WAS DISMISSED. ON 8-19-97, BLANKENSHIP EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY APPEALING TO THE CHIEF INSPECTOR. ON 9-15-97 THE CHIEF INSPECTOR AFFIRMED THE DISMISSAL (GRIEVANCE NO. 7-97-9).

6.) ON 6-6-97, BLANKENSHIP SUBMITTED TO DEFENDANT WILKINSON A LETTER COMPLAINING OF ASATRU RELIGIOUS DISCRIMINATION. WILKINSON FAILED TO RESPOND.

7.) ON 7-1-97, BLANKENSHIP SUBMITTED TO GOVERNOR VOINOVICH A LETTER COMPLAINING OF ASATRU RELIGIOUS DISCRIMINATION, AND SERVED A COPY OF THIS LETTER UPON DEFENDANT WILKINSON.

8.) ON 8-15-97, BLANKENSHIP SUBMITTED TO OHIO ATTORNEY GENERAL BETTY MONTGOMERY COMPLAINING OF ASATRU RELIGIOUS DISCRIMINATION, AND SERVED A COPY OF THIS LETTER UPON DEFENDANT WILKINSON.

9.) ON 8-18-97, BLANKENSHIP AND OTHERS SERVED UPON SHIRLEY POPE, CORRECTIONAL INSTITUTION INSPECTION COMMITTEE A FORMAL COMPLAINT ON REFUSAL TO PROCESS COMPLAINTS/REQUESTS ON ASATRU RELIGIOUS MATTERS. A COPY OF THIS COMPLAINT WAS SERVED UPON DEFENDANT WILKINSON.

10.) ON 9-8-97, BLANKENSHIP AND OTHERS FILED A FORMAL COMPLAINT WITH THE CORRECTIONAL INSTITUTION INSPECTION COMMITTEE ON RELIGIOUS DISCRIMINATION, AND

FAILURE TO PROCESS RELIGIOUS COMPLAINTS. A COPY OF THIS COMPLAINT WAS SERVED UPON DEFENDANT WILKINSON.

11.) ON 8-25-97, BLANKENSHIP SUBMITTED TO DEFENDANT HART AN INFORMAL COMPLAINT REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. ON 8-27-97, HART REPLIED INFORMING BLANKENSHIP TO TAKE HIS COMPLAINTS TO DEFENDANT GRIFFIN.

12.) ON 8-4-97, BLANKENSHIP SUBMITTED TO DEFENDANT GRIFFIN A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO PROCESS SAME. ON 8-29-97, BLANKENSHIP SUBMITTED TO DEFENDANT HART A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. HART RETURNED THE FORM REFUSING TO PROCESS SAME. ON 9-8-97, BLANKENSHIP SUBMITTED ANOTHER DRC POLICY 309-01 FORM UPON DEFENDANT GRIFFIN REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO TIMELY RESPOND. ON 10-9-97, BLANKENSHIP EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY SUBMITTING TO DEFENDANT SCHWARZ A DRC POLICY 309-01 APPEAL REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. SCHWARZ FAILED TO PROCESS THIS APPEAL. TO FURTHER EXHAUST ADMINISTRATIVE REMEDIES, BLANKENSHIP, ON 11-21-97, FILED A GRIEVANCE WITH THE CHIEF INSPECTOR ALLEGING RELIGIOUS DISCRIMINATION IN FAILING TO PROCESS DRC POLICY 309-01 ASATRU RELIGIOUS REQUESTS, AND ASKING

FOR ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. ON 12-17-97 THE CHIEF INSPECTOR REFUSED TO PROCESS THE GRIEVANCE STATING THE ISSUES WERE "NOT GRIEVABLE".

13.) ON 9-18-97, BLANKENSHIP SUBMITTED A LETTER TO DEFENDANT COLLINS COMPLAINING OF RELIGIOUS DISCRIMINATION AND ASKING THAT THE ASATRU RELIGION AND PRACTICES BE ACCOMMODATED. COLLINS FAILED TO RESPOND.

14.) ON 8-31-97, BLANKENSHIP SUBMITTED A LETTER TO DEFENDANT HART REQUESTING ACCOMMODATION OF THE ASATRU RELIGION. HART FAILED TO RESPOND.

15.) ON 10-27-97, BLANKENSHIP SUBMITTED A LETTER TO DEFENDANT COLLINS COMPLAINING OF THE REPEATED FAILURE OF GRIFFIN AND HART TO PROCESS DRC POLICY 309-01 RELIGIOUS ACCOMMODATION REQUESTS. A COPY OF THIS LETTER WAS SERVED UPON DEFENDANT WILKINSON. NO REPLY WAS RECEIVED.

16.) ON 10-28-97, BLANKENSHIP SUBMITTED AN INFORMAL COMPLAINT TO DEFENDANT HART ON THE REPEATED FAILURE TO PROCESS DRC POLICY 309-01 ASATRU RELIGIOUS REQUESTS. HART REPLIED ON 10-31-97 STATING THE INSTITUTION WOULD NO LONGER INVOLVE ITSELF IN ASATRU RELIGIOUS REQUESTS.

17.) ON 10-14-97, BLANKENSHIP SUBMITTED TO DEFENDANT GRIFFIN AN INFORMAL COMPLAINT CHARGING HIM WITH RELIGIOUS DISCRIMINATION FOR FAILING TO ANSWER OR RESPOND TO ASATRU RELIGIOUS REQUESTS

AND FAILURE TO PROCESS DRC POLICY 309-01 ASATRU RELIGIOUS ACCOMMODATION FORMS. GRIFFIN FAILED TO RESPOND. ON 11-1-97, BLANKENSHIP FILED A GRIEVANCE ON THIS MATTER. ON 11-13-97 THE GRIEVANCE WAS DISMISSED. ON 11-17-97 BLANKENSHIP EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY APPEALING TO THE CHIEF INSPECTOR. THE CHIEF INSPECTOR, ON 12-17-97, AFFIRMED THE DISMISSAL OF THE GRIEVANCE. (GRIEVANCE NO. 11-97-13).

18.) ON 12-3-97, BLANKENSHIP RECEIVED FROM WILLIAM McGINNIS, THE INSTITUTIONAL INSPECTOR, THE BELATED REPLY BY DEFENDANTS GRIFFIN AND COLLINS TO HIS 9-8-97 DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. ON 11-13-97 GRIFFIN AND COLLINS HAD DENIED REQUEST FOR ACCOMMODATION OF ASATRU RELIGION BY STATING THAT ASATRU WAS NOT A "MAINSTREAM RELIGION" AND CLAIMING A LACK OF CHAPEL SPACE. ON 12-3-97, BLANKENSHIP EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY FILING WITH DEFENDANT SCHWARZ A DRC POLICY 309-01 APPEAL. ON 12-9-97 SCHWARZ DENIED THE APPEAL. TO FURTHER EXHAUST ADMINISTRATIVE REMEDIES, BLANKENSHIP, ON 12-11-97 FILED WITH THE CHIEF INSPECTOR A GRIEVANCE CHALLENGING THE LEGALITY OF REFUSING TO ACCOMMODATE THE ASATRU RELIGION AND PRACTICES. THE CHIEF INSPECTOR, ON 1-21-98, AFFIRMED DISMISSAL OF THE APPEAL. (GRIEVANCE NO. CI-97-516).

VII: FACTS RELATING TO PLAINTIFF SCHOCKE INCLUDE:

1.) ON 8-12-97, SCHOCKE SERVED UPON DEFENDANT GRIFFIN A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO PROCESS SAME.

2.) ON 9-8-97, SCHOCKE SERVED UPON DEFENDANT HART A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. HART RETURNED THE FORM REFUSING TO PROCESS SAME.

3.) ON 10-9-97, SCHOCKE SERVED UPON DEFENDANT GRIFFIN ANOTHER DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES, AGAIN GRIFFIN FAILED TO PROCESS THIS FORM.

4.) ON 11-17-97, SCHOCKE SUBMITTED TO DEFENDANT HART AN INFORMAL COMPLAINT ON THE REPEATED FAILURE TO PROCESS DRC POLICY 309-01 FORMS REQUESTING ACCOMMODATION OF THE ASATRU RELIGION. HART FAILED TO REPLY, ON 12-2-97, SCHOCKE FILED A GRIEVANCE AGAINST GRIFFIN AND HART ALLEGING RELIGIOUS DISCRIMINATION FOR THE REPEATED FAILURE TO PROCESS ASATRU RELIGIOUS REQUESTS. ON 12-15-97, WILLIAM McGINNIS, THE INSTITUTIONAL INSPECTOR, CALLED SCHOCKE TO HIS OFFICE TO STATE THE CHAPLAIN HAD SENT HIS REQUEST TO COLUMBUS. ON 12-22-97, SCHOCKE WROTE THE INSPECTOR REQUESTING A WRITTEN DISPOSITION TO HIS GRIEVANCE. NO DISPOSITION TO THE GRIEVANCE WAS GIVEN. ON 12-28-97,

SCHOCKE EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY APPEALING THIS MATTER TO THE CHIEF INSPECTOR. THE CHIEF INSPECTOR, ON 1-27-98, RESPONDED BY ALLEGING SCHOCKE HAD WITHDRAWN HIS GRIEVANCE.

5.) ON 9-2-97, SCHOCKE SUBMITTED TO DEFENDANT HART AN INFORMAL COMPLAINT SEEKING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. HART FAILED TO RESPOND.

6.) ON 8-18-97, SCHOCKE SUBMITTED TO DEFENDANT SCHWARZ AN INFORMAL COMPLAINT SEEKING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. SCHWARZ FAILED TO RESPOND.

VIII: FACTS RELATING TO PLAINTIFF STUMP INCLUDE:

1.) ON 8-18-97, STUMP SUBMITTED TO DEFENDANT GRIFFIN A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO PROCESS THIS FORM.

2.) ON 10-23-97, STUMP EXHAUSTED ADMINISTRATIVE REMEDIES BY SUBMITTING A DRC POLICY 309-01 APPEAL UPON DEFENDANT SCHWARZ ASKING FOR ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. SCHWARZ FAILED TO PROCESS THE APPEAL.

3.) ON 12-22-97, STUMP FURTHER EXHAUSTED ADMINISTRATIVE REMEDIES BY FILING A GRIEVANCE WITH THE CHIEF INSPECTOR ASKING THAT THE ASATRU RELIGION AND

PRACTICES BE PERMITTED, AND THAT GRIFFIN AND SCHWARZ BE DISCIPLINED FOR THEIR DISCRIMINATORY ACT OF FAILING TO PROCESS ASATRU RELIGIOUS REQUESTS. THE CHIEF INSPECTOR, ON 1-27-98, REPLIED REFUSING TO PROCESS THE GRIEVANCE.

IX: FACTS RELATING TO PLAINTIFF LEMASTERS INCLUDE:

1.) ON 8-18-97, LEMASTERS SUBMITTED TO DEFENDANT GRIFFIN A DRC POLICY 309-01 FORM REQUESTING ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. GRIFFIN FAILED TO PROCESS THIS FORM.

2.) ON 10-23-97, LEMASTERS EXHAUSTED ADMINISTRATIVE REMEDIES BY SUBMITTING A DRC POLICY 309-01 APPEAL UPON DEFENDANT SCHWARZ ASKING FOR ACCOMMODATION OF THE ASATRU RELIGION AND PRACTICES. SCHWARZ FAILED TO PROCESS THE APPEAL.

3.) ON 12-22-97, LEMASTERS FURTHER EXHAUSTED ALL ADMINISTRATIVE REMEDIES BY FILING A GRIEVANCE WITH THE CHIEF INSPECTOR ASKING THAT THE ASATRU RELIGION AND PRACTICES BE ACCOMMODATED, AND THAT GRIFFIN AND SCHWARZ BE DISCIPLINED FOR THEIR ACTS OF DISCRIMINATION IN REFUSING TO PROCESS ASATRU RELIGIOUS REQUESTS. THE CHIEF INSPECTOR, ON 1-27-98, REPLIED REFUSING TO PROCESS THE GRIEVANCE.

V. Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

(A) INJUNCTIVE RELIEF PERMITTING ASATRU INMATES:

1.) ONE HOUR GROUP RELIGIOUS STUDY EVERY TWO WEEKS.

2.) GROUP WORSHIP SERVICES 12 TIMES YEARLY AT HOLY DAYS.

3.) ASATRU GOTHI (PRIEST) OR INMATE LED STUDY AND WORSHIP.

4.) RECOGNITION OF ASATRU HOLY DAYS AND FEAST DAYS.

5.) HOLY TEXTS AND MEDALLIONS FROM PUBLIC FUNDS.

6.) RIGHT TO OBTAIN/POSSESS HOLY RITUAL ITEMS SUCH AS RUNES, DRINKING HORN, BLESSING TWIG, CARDBOARD STAFF AND SWORD, STATUES OF GODS AND GODDESSES, ALTAR CLOTH, MEAD SUBSTITUTE, ARM BAND, MEDALLION.

7.) AN AREA SET ASIDE FOR ASATRU WORSHIP INDOORS OR OUTDOORS.

8.) RIGHT TO HAIR AND BEARD IN ACCORDANCE WITH RELIGIOUS BELIEFS.

(B) TEMPORARY AND IMMEDIATE INJUNCTION FOR:

9.) RIGHT TO WEAR HAIR AND BEARD IN ACCORDANCE WITH RELIGIOUS BELIEFS DURING PENDENCY OF THIS ACTION.

10.) RIGHT TO MEET FOR GROUP STUDY AND WORSHIP DURING THE PENDENCY OF THIS ACTION.

11.) PROHIBITION AGAINST TRANSFER OF PLAINTIFFS TO ANOTHER INSTITUTION WITHOUT JUST CAUSE DURING PENDENCY OF THIS ACTION.

(C) COMPENSATORY DAMAGES IN THE SUM OF $1,500.00

(D) PUNITIVE DAMAGES IN THE SUM OF $15,000.00

(E) NOMINAL DAMAGES IN THE SUM OF $1.00

(F) DEFENDANTS TO PAY COST OF THIS ACTION.

Signed this 25 day of February, 1998.

/s/ John Miller
Signature of Plaintiff

I declare under penalty of perjury that the foregoing is true and correct.

2-25-98 /s/ John Miller
Date *Signature of Plaintiff*

UNDER THE PENALTY OF PERJURY, I HEREBY CERTIFY THAT THE ALLEGATIONS IN THE FOREGOING COMPLAINT ARE TRUE AND CORRECT.

February 25, 1998 DATE	/s/ Rick Hall/AKA Raven McCloud SIGNATURE OF PLAINTIFF HALL
02-25-98 DATE	/s/ Daryl Blankenship/ A.K.A. [Illegible] SIGNATURE OF PLAINTIFF BLANKENSHIP
2/25/98 DATE	/s/ Fred L. Schocke SIGNATURE OF PLAINTIFF SCHOCKE
2-25-98 DATE	/s/ Roy Howington SIGNATURE OF PLAINTIFF HOWINGTON
2/25/98 DATE	/s/ Jeffrey S. Holland SIGNATURE OF PLAINTIFF HOLLAND
2/25/98 DATE	/s/ [Illegible] Dattilo SIGNATURE OF PLAINTIFF DATTILO
2-25-98 DATE	/s/ Matthew Stump SIGNATURE OF PLAINTIFF STUMP
2/25/98 DATE	/s/ William Lemasters SIGNATURE OF PLAINTIFF LEMASTERS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Miller, et al.,	:	Case No. C2-98-275
Plaintiffs,	:	Judge Sargus
v.	:	Magistrate Judge Kemp
Reginald Wilkinson, et al.,	:	CLASS ACTION
Defendants.	:	

PLAINTIFF'S THIRD
SUPPLEMENTAL COMPLAINT

Now comes Plaintiffs and for their Third Supplemental Complaint make the following allegations, statements and claims:

1. On March 12, 1998, Plaintiffs filed the instant action, *pro se,* as a class action lawsuit against Defendants alleging a violation of Plaintiffs right to free exercise of their Asatru religion. In their original Complaint, Plaintiffs prayed for temporary and permanent injunctive relief and for damages. Among other things, Plaintiffs Complaint sought injunctive relief to conduct weekly worship services, be permitted to recognize their religious holy days, obtain and possess sacred objects which are a part of Plaintiffs religious services, and keep their hair in accordance with Plaintiff's religious beliefs.

2. Plaintiffs incorporate, as if fully rewritten herein, all of the paragraphs contained in Plaintiffs original Complaint.

3. Plaintiffs incorporate, as if fully rewritten herein, all of the paragraphs contained in the Plaintiffs' Amended Complaint.

4. Plaintiffs incorporate, as if fully rewritten herein, all of the paragraphs contained in Plaintiffs' Second Supplemental Complaint and all other amended complaints and supplemental complaints in this action.

5. Jurisdiction of this action is based on 28 U.S.C. §§ 1331, 1343, and 1367(a), 42 U.S.C. § 1983, and applicable provisions of Ohio law.

6. Declaratory and injunctive relief, damages, costs and attorneys' fees are sought pursuant to 28 U.S.C. §§ 2201-and 2202, 42 U.S.C. §§ 1983 and 1988, the First and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Ohio Constitution. They are also sought pursuant to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), signed into law on September 29, 2000, which applies to all programs that receive Federal financial assistance. (A copy of which is attached as Exhibit A.)

COUNT VI

7. Defendants' conduct as set forth in the Complaint, the Amended Complaint, the Second Supplemental Complaint and all other amended and supplemental complaints in this action constitutes a substantial burden on Plaintiffs' free exercise of religion in violation of the RLUIPA.

COUNT VII

(Pendent State Cause of Action)

8. Defendants' conduct as set forth in the Complaint, the Amended Complaint, the Second Supplemental Complaint and all other amended and supplemental complaints in this action constitutes preferential treatment in violation of the Article I, § 7 of the Ohio Constitution. Ohio. Const. Art I, § 7.

WHEREFORE, in addition to the relief already requested in this case, Plaintiffs also pray for a declaratory judgment that Defendants' conduct in this case violates the Religious Land Use and Institutionalized Persons Act of 2000 and Article I, § 7 of the Ohio Constitution. Plaintiffs further pray for injunctive and all other appropriate relief prohibiting Defendants from engaging in such conduct.

Respectfully submitted,

/s/ David Goldberger
David Goldberger (001029)
The Ohio State University
College of Law
Clinical Programs
55 West 12th Avenue
Columbus, Ohio 43210
Counsel for Plaintiff Class
(614) 292-6821

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEE, et al.	:	Case No. C2-97-382
Plaintiffs	:	Judge Graham
v.	:	Magistrate Judge Abel
Wilkinson, et al.	:	
Defendants	:	

[Pro Se]

FIRST AMENDED COMPLAINT

(Filed May 14, 2001)

1). Reginald Wilkinson is the Director of the Ohio Department of Rehabilitation and Correction (hereinafter "DoRC"), a state Department created by Statute pursuant to Ohio Revised Code §121.02(Q).

2). Reverend David Schwarz is South Regional Religious Services Administrator for the DoRC.

3). Nicholas G. Menedez is Chief Inspector of Institutional Services for DoRC

4). L. C. Coval is assistant Chief Inspector of Institutional Services for the DoRC.

5). K. L. Brown is Assistant Chief Inspector of Institutional Services for the DoRC.

6). Rita K. Panzone is employed by the DoRC Legal Services, and performs duties for the Central Office Publication Screening Committee (hereinafter COPSC).

7). George D. Alexander was, at the time of certain events contained herein, Warden of the Pickaway Correctional Institution, a Minimum Security State Penal Facility operated by the DoRC.

8). Dianne Walker is Warden, Pickaway Correctional Institution.

9). Jim Erwin was, at the time of certain events contained herein, Inspector of Institutional Services for Pickaway Correctional Institution ("P.C.I.").

10). Ron Carnein is Deputy Warden of Special Services for PCI.

11). Rudy Pringle is employed as Captain at PCI.

12). Walter Lowery is employed as a Chaplain at PCI.

13). Rick Stallins is employed as a Sergeant at the Pickaway Corr. Inst.

14). Chad Van Sickle is employed as a Correctional Officer at PCI.

15). John Doe and/or Jane Doe is/are any individual(s) whose identity(ies) is/are presently unknown, but who would be named Defendant(s) if his/her/their name(s) and/or identity(ies) were known.

16). All Defendants are being sued in their individual (personal) capacities as well as their Official (professional) capacities, to include their Agent(s), Employee(s), Assignee(s), Representitive(s) and Successor(s) in Office.

17). Plaintiff LEE, also known to DoRC Officials as Inmate Hampton, is a practicing Witch: That is, LEE's sincerely held Religious Beliefs are those of the Wicca

Faith, a valid, recognized Religion in the United States of America.

18). Plaintiff Jon B. Cutter is a Practicing Satanist: That is, Cutter's sincerely held Religious Beliefs are those of the Blackstar Church, a.k.a. the Church of the Anti-Christ, a Church of Satanism, Satanism being a valid, recognized Religion in the United States of America.

19). The First Amendment to the United States Constitution gives all persons the right to have, hold, and Practice the Religion of their Choice.

20). The Fifth and Fourteenth Amendments to the United States Constitution provide Due Process of Law for all persons.

21). The Fourteenth amendment to the United States Constitution provides for Equal Protection of the Laws for all persons.

22). Defendants have no compelling Governmental interest in burdening the Plaintiffs' exercise of Religion, and indeed, have written Rules, Regulations, Policies and/or Procedures that supposedly permit free and unfettered exercise of Religion to all inmates incarcerated in the DoRC.

23). The Pickaway Correctional Institution Religious Services Department has taken steps to accommodate the Religious Practice of a wide variety of Religious Beliefs, including Catholocism, Islam, Native American, etc.

24). Christian, Islammic, Native American, and inmates of other Faith Groups than those of the Plaintiffs are permitted to gather in various places in the Institution to

pray, study, and discuss their Religion amongst themselves without Staff Supervision.

25). During the Holy Month of Ramadan, Islammic inmates were awakened by Institutional Personnel and allowed to leave the Inmate Housing Areas during a time when other inmates were not allowed to, in order to gather together in spaces provided in the Housing Units for them to perform their necessary Religious Rites, unsupervised by any Staff Personnel.

26). JayCees, Red Cross, and other Civic organizations in DoRC Institutions are permitted to elect their own leaders from among their Membership, and these elected leaders essentially run the meetings and other functions, supervised by a Staff volunteer.

27). The Holy Bible, the Holy Koran, and numerous other Religious Texts available to inmates of the DoRC depict incidents of violence and/or advocate violence in the body of their texts.

28). PCI holds no Religious Services that cater to the Religious Beliefs of Plaintiffs herein.

29). Plaintiffs have asked for, and been denied, Religious Services for their respective Religions.

30). PCI, through the Inmate Library, allows inmates access to a wide variety of Religious materials, including Christian, Islam, Buddhist, Zen, Tao, and other materials.

31). PCI has no material in its Library relating to the Religious Beliefs of Plaintiffs herein, except minor information in Encyclopedic-type materials, some of which gives misinformation about Plaintiffs Religious Beliefs

that is repugnant to Plaintiffs Religious Beliefs, and Inflammatory.

32). Plaintiffs have asked for, and been denied, access to specific materials relating to Plaintiffs Religious Beliefs in the Library.

33). Plaintiffs have asked for, and been denied, access to specific materials to be given them, personally, relating to their respective Religious Beliefs, such as the Institution provides Holy Bibles and Holy Korans for inmates of Christianity and Islammic Faith Groups.

34). PCI allows inmates to receive Religious/Inspirational Literature from outside the Institution sources.

35). the PCI Religious Services Department distributes various Religious/Inspirational Literature of Christian, Islammic, and other Faith Groups to members of the PCI Population.

36). The PCI Religious Services Department provides Plaintiffs no Religious/Inspirational Literature relating to their respective Religious Faith Groups.

37). The PCI Mailroom routinely Withholds for Screening as "Inflammatory" Religious/Inspirational Literature relating to Plaintiffs' respective Religious Faith Groups, while routinely permitting – without Screening – literature relating to Faiths such as Christianity, Islam, etc.

38). Plaintiffs Religious/Inspirational Literature Withheld by the Institutional Mailroom has, when Withholding has been Appealled, been Withheld by DoRC Officials for periods of up to eleven (11) months before Review has been completed.

39). Plaintiffs have filed Grievances through the Institutional Grievance procedure relating to their assertations of Religious Freedoms, and have exhausted all available remedies – in some instances *several times* – in seeking redress at the Institutional level.

FIRST COMPLAINT

40). Plaintiffs incorporate herein by this reference, as if fully rewritten, the facts alledged in paragraphs one (1) through thirty-nine (39), above.

41). Plaintiffs have attempted to access Literature necessary to the proper Practice of their respective Religions, and have suffered in the following:

A). FIRST WITHHOLDING

1). Plaintiff Cutter did, as an act of the assertation of his Religious Faith, on or about September 21, 1995, in compliance with DoRC Policy 309-05, order by mail the following four (4) books:

The magician's Workbook

Of Witches

The Ritual Book of Magic

The book of Black Magic

2). On or about October 6, 1995, cutter was called to the Institutional "Vault" on a "package pass." When Officer Van Blankenship noted the titles of the books being received, he caused these books, which were mentioned by title in paragraph 41(A)(1), above (hereinafter "Books"), to be sent to Chaplain Lowery for Review, in violation of O.A.C. 5120-9-19.

3). On or about October 22, 1995, Cutter was again called to the Vault, where Officer Blankenship attempted to have Cutter mail the Books out of the Institution, under orders from Lowery per an October 13, 1995, Inter-Office Communication ("Memo"), in violation of O.A.C. 5120-9-19. Cutter refused to send the Books out until they were properly Screened under O.A.C. 5120-9-19, and was granted delay in mailing until he could confer with Inspector of Institutional Services (hereinafter "IIS") D. McSavaney.

4). On or about October 23, 1995, Cutter met with Mrs. McSavaney, who called the Vault and ordered the Books be returned to the Mailroom for processing in accordance with O.A.C. 5120-9-19.

5). On or about October 27, 1995, Cutter received "Notice of Withholding: Printed Material" (hereinafter "Notice") for each Book, from Officer Blankenship, who had checkmarked boxes for "Inflammatory" and "'incites, aids or abets "violence" against other' "on the Notice for "The Ritual Book of Magic," and the box for "Inflammatory" only for each of the other three (3) Books. Each Notice, under "examples of . . . " stated "per Chaplain Lowery . . . " certain pages "constitutes a clear and present danger to the security and safety of the, institution."

6). On or about October 31, 1995, Cutter sent these Notices to IIS McSavaney, checking the box for "request review" of the material, while submitting four (4) pages of wrtitten objections and argument to the Withholding of this Religious material.

7). On or about November 17, 1995, Cutter received revised Notice for each Book, each Notice dated November 11, 1995, each marked "For clarification purposes," and each checkmarked as "Inflammatory"

and "'aids, incites or abets "violence" against other.'" Each Notice had quotes, under "examples of . . . " that were taken directly from Lowery's Memo of October 13, 1995, mentioned in paragraph 41(A)(3), above.

8). Lowery was, during the time period of apprximately October 1, 1995, to December 1, 1995, one (1) of three (3) members of the PCI Publication Screening Committee, thereby denying Cutter a fair and impartial Review of the initial Withholding.

9). Despite the admonishment in O.A.C. 5120-9-19(F)(1) that Review is to be "within five working days . . . after reciept of printed material . . . " Cutter was not given Decision of the PCI PCS until on or about June 21, 1996, when Cutter was passed to see Mrs. Deborah Timmerman-Cooper, Acting IIS due to the promotion of former IIS McSavaney. Mrs. Timmerman-Cooper showed Cutter the Books, stated they were deemed "Inflammatory" by the PCI PSC, and allowed Cutter to appeal that Decision to the COPSC (DoRC Central Office Publication Screening Committee) by signing Decision on Withholding (hereinafter "Decision") for each Book, requesting Review.

10). On or about September 18, 1996, Cutter received a form letter dated September 6, 1996, for each Book, stating that " . . . it has been determined by the Publication Screening Committee and the Director of the Department of Rehabilitation and Correction that . . . " each Book " . . . was found to be INFLAMMATORY as defined by Administrative Regulation 5120-9-19." Each form letter was designated to be from the "Publication Screening Committee," "Legal Services, Coordinator," and each form letter carried initials known to be those of Rita K. Panzone, an Employeee of DoRC Legal Services.

11). Having exhausted his available remedies in this matter, Cutter thereafter contacted new IIS Jim Erwin and timely mailed the Books out of the Institution at his expense.

B). SECOND WITHHOLDING

1). On or about May 24, 1996, Cutter did, as an act of the assertation of his Faith, in compliance with DoRC Policy 309-05, order by mail the book "The Satanic Bible" by Anton LeVey.

2). On or about June 13, 1996, fellow Satanist James Barnes related to Cutter that he (Barnes) had overheard a conversation between PCI EMployees Acting IIS Timmerman-Cooper, Nancy Holt, and Annette Chambers, wherein Barnes heard Mrs. Timmerman-Cooper stating that she had to form a Screening Committee to review a Satanic Bible.

3). On or about July 30, 1996, not having received his Satanic Bible and having sent a letter of inquiry, Cutter received a letter from Serpent's Occult Bookstore indicating that the Satanic Bible ordered had been mailed to Cutter May 28, 1996, and had not been returned to the Bookstore.

4). On or about August 9, 1996, Cutter received kite response from Lt. J. Reliford of the PCI Mailroom indicating that no reciept of a Satanic Bible had been noted in the Mail Office Logs.

5). On or about August 14, 1996, Cutter took Barnes, the letter referenced in paragraph 41(B)(3), above, and the kite response from Lt. Reliford to IIS Erwin to have the Satanic Bible found.

6). On or about August 26, 1996, Erwin called Cutter to the Office of the IIS to report that the Satanic Bible had been "found," but Erwin refused to give details of the investigation to Cutter.

7). On or about August 30, 1996, Cutter received a Decision form signed by Erwin indicating that, on August 26, 1996, Erwin found the Satanic Bible to be "Inflammatory," as it "'incites, aids or abets "violence" against others.'" Cutter sent an Informal Complaint to Erwein regarding the violation of the O.A.C. by denying Cutter a Review through the Mailroom before making Decision in the Office of the IIS.

8). On or about September 23, 1996, Cutter received a copy of the Decision referenced in paragraph 41(B)(7), above, with the addition of Lt. J. Reliford's signature above that of Erwin. Such Action still denied Cutter one (1) level of Review of the three (3) supposedly available.

9). Cutter, however, timely returned this Decision form, requesting Review by the COPSC, enclosing a letter giving argument against Withholding.

10). On or aobut January 21, 1997, Cutter filed Grievance with Erwin regarding the failure of the COPSC to adhere to O.A.C. 5120-9-19(G)(1) by not reviewing the Material "within twenty business days." Erwin answered this Grievance to the effect that the material was being reviewed by the COPSC and that answer would be given when the Review was completed, failing to answer the specific complaint of filaure to adhere to the time limits in the Statute.

11). On or about February 4, 1997, Cutter received a form letter purportedly from the COPSC, carrying the initials known to be those of Rita K. Panzone, stating that the Satanic Bible was being denied Cutter "based upon prior screening," thereby indicating that this material was not given a fair and adequate

Review which took into account Cutter's objections to the Withholding.

12). Cutter timely mailed the Satanic Bible out of the Institution at his own expense.

C). <u>THIRD WITHHOLDING</u>

1). Plaintiff LEE did, as an act of the assertation of his Religious Faith, on or about June 10, 1996, purchase through mail order the book "Wicca – The Ancient Way" (hereinafter "Wicca").

2). On or about July 30, 1996, having not received Wicca, and having conferred with Cutter about this, LEE noted Cutter's having received the letter referenced in paragraph 41(B)(3), above, and noted that said letter also indicated that Wicca had been mailed to LEE on June 23, 1996.

3). On or about August 12, 1996, in a meeting with Lowery, LEE inquired about Wicca, and was told by Lowery that he (Lowery) was called by the Mailroom when Wicca was received in June, 1996, and that he (Lowery) told the Officer calling to process Wicca in accordance with the O.A.C.

4) On or about August 14, 1997, LEE complained to Erwin about Wicca being missing, whereupon Erwin alleged that he would "look into it."

5). On or about August 26, 1996, LEE was called to Erwin's Office, shown Wicca, and told by Erwin that it was found "in my secretary's Office," Erwin also stating that he (Erwin) had "read part of it, it's pretty interesting." Erwin refused to give Wicca to LEE, showing an unsigned Notice, stating that it "has to be reviewed."

6). On or about August 29, 1997, LEE received the Notice referred to in paragraph 41(C)(5), above,

signed by Erwin to Withhold Wicca. LEE returned the Notice to Erwin with the Complaint that it was improper for Erwin to sign the Notice, as Erwin had admitted reading part of Wicca and therefore should know that it does not incite, aid or abet violence against others, also asking to have a Mailroom Employee Review Wicca and sign a Notice for Withholding, if appropriate.

7). On or about September 18, 1996, LEE inquired about the Notice for Wicca, and was told by Erwin that Wicca was "at the screening committee," despuite LEE not yet having received a proper Notice, and opportunity to submit objections to the Withholding. Erwin told LEE to submit any objections to him (Erwin), which LEE promptly did.

8). On or about October 22, 1996, LEE received a Decision signed by Erwin, alleging Wicca "'incites, aids or abets "violence" against others.'" This Decision also noted that one page "promotes secret cult," but makes no response to any objections submitted by LEE, nor does it explain how "promoting secret cult" could in any way "'incite[], aid or abet[] "violence" against others.'" LEE timely appealled this Decision to the COPSC, submitingfurther objecitons through Erwin.

9). On or about January 17, 1997, LEE, Filed Grievance 1-97-13, complaining that the Review of Wicca was taking far longer than the twenty working days allowed by O.A.C. 5120-9-19. In answering, Erwin merely acknowledged that Wicca was being Reviewed by the COPSC, without making any findings as to the reason(s) for the delay or when the Review would be completed. LEE timely appealed this Grievance response.

10). On or about March 10, 1997, LEE received a form letter purportedly from the COPSC, carrying no initials or signature, stating that " . . . it has been determined by the Publication Screening Committee and the Director of the Department of Rehabilitation and Correction that "Wicca" was found to be INFLAMMATORY as defined by . . ." the O.A.C. LEE timely contacted Erwin to mail Wicca to this Court, to be used as Evidence in this matter, but Erwin has refused to, stating that the Court is not on LEE's Visiting list, and therefore not one of hte options to whom LEE can mail this item.

11). LEE has Filed Grievance with the Chief Inspector's Office regarding Wicca's not being mailed to this Court by Erwin, and the Office of the Chief Inspector agrees with Erwin, that LEE may not mail this item directly to the Court to be used as Evidence in this matter.

12). LEE has no person or persons on his approved visiting list to whom he can mail this item and be reasonably assurred that they will mail it to the Court, nor may LEE be assurred that mailing Wicca back to the Book-store will make it available as Evidence in this matter.

13). Wicca is currently being held in the PCI Office of the IIS

D). <u>DENIAL IN LIBRARY AND HOUSING</u>

1). On or about July 12, 1996, LEE sent Informal Complaint to the Library, asking that the Library stock some books giving "details and practices of Rites and Ideals of the Wiccan Religion."

2). On or about July 16, 1996, the Complaint referenced in paragraph 41(D)(1), above, was returned, after having been forwarded to Lowery, who gave a

response that was not responsive to the request made.

3). On or about July 18, 1996, Cutter sent a kite to Lowery asking that Lowery give Cutter a Satanic Bible "since you give Christian Bibles away for free to anyone who wants one." This request was denied.

4). On or about July 23, 1996, LEE Filed Grievance 7-96-4, citing the "Lack of religious materials in the Library for Wicca, which impedes my learning about, and practicing Wicca . . ." Erwin answered that the "Library will accept requests for acquisition of materials."

5). On or about August 4, 1996, LEE requested Review by Erwin, under DoRC Policy 106-16, of the Library book "Encyclopedia of Occultism and Parapsychology," due to it "being inflammatory, due to its misinformation and denigration of my religious beliefs."

6). On or about August 8, 1996, LEE sent a kite to the Library, listing approxiamtely fourteen (14) books LEE wished the Library to order to further LEE's Religious Studies. This kite was responded to by Librarian Pavanaja Komma who, after consulting with Erwin, told LEE to "come to the Library and refer *Encyclopedia of Occultism and Parapsychology*," the same book LEE had already informed Erwin was denigrating to LEE's Religious Beliefs! This was a malicious act by Erwin to disrespect LEE's Beliefs.

7). On or about August 13, 1996, Erwin wrote a letter to LEE, indicating that the Review of the material requested in paragraph 41(D)(5), above, showed the material "is appropriate for inclusion" despite LEE's assertation that it is inflammatory and denigrating to LEE's Religious Beliefs.

8). On or about August 25, 1996, Cutter sent Informal Complaint to Alexander, asking to be provided with either a Satanic Bible or the Satanicon, either of which would satisfy Cutter's need for the central Religious Text of Cutter's Religion. Alexander's reply was not responsive to the issue.

9). On or about August 26, 1996, LEE sent Complaint to Carnein asking that specific books on Wicca be placed in the Library. This was answered that a "request for specific titles to be placed in the Library . . . will be considered . . ." This Informal additionally requested that "the Institution provide me with a personal copy" of a Wicca book, which Carnein declined to answer.

10). On or about September 3, 1996, LEE sent Informal to Alexander, asking to be provided with a copy of at least one Wicca book, the same as Christians are provided with Bibles, and asking that other books on Wicca be placed in the Library. This Complaint was answered by Lowery, who replied in a manner that was not responsive to the issue raised.

11). On or about September 16, 1996, Cutter Filed Grievance regarding not being given the central Religious Text of his Religion the same as other Religions are given theirs by the Institution. This Grievance was denied by Erwin, and thereafter Appealled by Cutter, but not answered by Chief IIS.

12). On or about September 18, 1996, LEE Filed Grievance asking to be given at least one (1) Wicca book, the same as Christians and others are given Bibles, Korans, etc., and also asking that books be placed in the Library Concerning Wicca. The request to be given a Text as other Religions are was denied by Erwin. The request for specific titles to be placed in the Library was not responded to by Erwin.

13). On or about October 16, 1996, L. C. Coval wrote a "Decision of the Chief Inspector" affirming all findings in Grievance 7-96-4.

14). On or about November 1, 1996, LEE sent a second Informal to Carnein listing the same books as in the Informal referred to in paragraph 41(D) above, asking if these titles had been reviewed for possible inclusion i the Library. This Informal was not answered.

15). On or about December 15, 1997, LEE, as part of Grievance 12-96-7, Complained about the Library not having stocked any of the Wicca books h (LEE) had requested be reviewed for inclusion. Erwin, in answering, sent LEE a copy of Carnein's August 29, 1996, answer to the Informal referenc in paragraph 41(D)(9), above, stating "Mr. Carnein has appropriately ans wered your concerns," ignoring the fact that the answer does not give th requested access, only implies consideration of it.

16). On or about February 9, 1997, LEE showed to Informal referenced in paragraph 41(D)(9), above, to Komma, and asked of any of the titles on t Informal had been ordered for inclusion in the Library, to which Komma answered that she didn't recognize any as having been ordered, therefore showing the lack of consideration for inclusion.

17). To date, October 23, 1997, none of the Titles LEE has requested be Reviewed for possible inclusion in the Library have been stocked.

E). <u>SERPENT's occult catalog</u>

1). On or about December 2, 1996, both LEE and Cutter received Notices o an unidentified item that supposedly "'incites, aids or abets "violence against others,'" as it is a "List of books that are not allowed

in the Institution." This Notice came from the Institutional Mailroom. Both LEE and Cutter asked Erwin to identify the material for them, and when Erwin identified it as a catalog from Serpent's Occult Bookstore, both LEE and Cutter requested Review of the Withholding.

2). On or abour February 3, 1997, LEE received Decision on Withholding indicating the catalog from Serpent's Occult Bookstore "'incites, aids or abets "violence" against other'" as it "contains a list of books that are not allowed in the Institution." Said Decision was signed by Erwin, who had previously claimed that Cutter did not request Review of this catalog on Cutter's behalf.

3). LEE, after timely appealing this Decision to the COPSC, has received a form letter from the COPSC stating that the Serpent's Occult Catalog is "Inflammatory," and therefore denied to LEE.

4). This Catalog is currently being held in the PCI Office of the ISS, awaiting its being used as evidence in this matter.

42). Plaintiffs have attempted to access Areas/Materials? accommodations necessary to the proper Practice of their respective Religios Beliefs, and have suffered through the following incidents:

A). <u>CUTTER'S ATTEMPTS TO PRACTICE</u>

1). <u>Worship space</u>

a). On or about May 1, 1996, Cutter, in the first contact initiated by himself, sent Lowery a kite requesting a place to observe the Rituals of his Religion. When this Kite had gone unanswered past the five (5) working days allowed, Cutter sent a second kite to

Lowery, requesting the same, this being on or about May 15, 1996.

b). On or about May 16, 1996, Cutter received a Memo from Lowery, stating that the initial kite mentioned in paragraph 42(A)(1)(a), above, had been forwarded to Alexander and Carnein, while the second kite mentioned in said paragraph had been forwarded to Schwarz for Schwarz action thereupon.

c). On or about June 9, 1996, Cutter sent a letter to Schwarz, again making request for space to worship, and outlining materials and scheduling needed to accommodate this request.

d). On or about June 20, 1996, Cutter received letter from Schwarz answering Cutter's letter of June 9, 1996, telling Cutter to work with Lowery, but not giving specific approval or denial of Cutter's requests.

e). On or about June 28, 1996, Cutter met with Lowery to File a "Request for Accommodation of Religious Practices" (hereinafter "Request"), out-lining basic tenets and requirements of Cutter's Faith Group.

f). During the meeting referenced in paragraph 42(A)(1)(e), above, Lowery Policy 106-16, of the Library book "Encyclopedia of Occultism and Parapsychology," due to it "being inflammatory, due to its misinformation and denigration of my religious beliefs."

6). On or about August 8, 1996, LEE sent a kite to the Library, listing approxiamtely fourteen (14) books LEE wished the Library to order to further LEE's Religious Studies. This kite was responded to by Librarian Pavanaja Komma who, after consulting with Erwin, told LEE to "come to the Library and refer *Encyclopedia of Occultism and Parapsychology,*" the

same book LEE had already informed Erwin was denigrating to LEE's Religious Beliefs! This was a malicious act by Erwin to disrespect LEE's Beliefs.

7). On or about August 13, 1996, Erwin wrote a letter to LEE, indicating that the Review of the material requested in paragraph 41(D)(5), above, showed the material "is appropriate for inclusion" despite LEE's assertation that it is inflammatory and denigrating to LEE's Religious Beliefs.

8). On or about August 25, 1996, Cutter sent Informal Complaint to Alexander, asking to be provided with either a Satanic Bible or the Satanicon, either of which would satisfy Cutter's need for the central Religious Text of Cutter's Religion. Alexander's reply was not responsive to the issue.

9). On or about August 26, 1996, LEE sent Complaint to Carnein asking that specific books on Wicca be placed in the library. This was answered that a "request for specific titles to be placed in the Library . . . will be considered . . . "This Informal additionally requested that "the Institution provide me with a personal copy" of a Wicca book, which Carnein declined to answer.

10). On or about September 3, 1996, LEE. sent Informal to Alexander, asking to be provided with a copy of at least one Wicca book, the same as Christians are provided with Bibles, and asking that other books on Wicca be placed in the Library. This Complaint was answered by Lowery, who replied in a manner that was not responsive to the issue raised.

11). On or about September 16, 1996, Cutter Filed Grievance regarding not being given the central Religious Text of his Religion the same as other Religions are given theirs by the Institution. This Grievance

was denied by Erwin, and thereafter Appealled by Cutter, but not answered by Chief IIS.

12). On or about September 18, 1996, LEE Filed Grievance asking to be given at least one (1) Wicca book, the same as Christians and others are given Bibles, Korans, etc., and also asking that books be placed in the Library concerning Wicca. The request to be given a Text as other Religions are spoke words to the effect of "the Department is not going to give you a room. or any other items due to Security reasons," thereby indicating that a decision had been made to deny Cutter the Space and materials currently being requested *before* Cutter officially Filed the request and made known the Accommodations being requested. Lowery further answered, when Cutter asked about receiving Satanic literature, with a shrug and words to the effect that "you're between a rock and a hard spot," also stating to the effect that "I'm doing everything I've been instructed to by Dr. Schwarz."

g). On or about August 16, 1996, Cutter sent a kite to Lowery asking if a disposition had been made on the Request Filed June 28, 1996. Lowery's answer of August 22, 1996, was that this was "being reviewed by the Dept.'s legal counsel who handles [these] matters." However, this written answer is contrary to Lowery's June 28, 1996, statement to Cutter indicating that a Decision on this matter had already been made.

h). On or about September 24, 1996, Cutter Filed GRievance 9-96-8 with Erwin regarding the continued failure to receive an answer to the Request Filed June 28, 1996. Erwin's answer was that new "guidelines for recognizing and accommmodating religious practices . . . are scheduled to be released to Staff on 10/8/96. After that date, the Grievant may meet with the

Institutional Chaplain to find the decision to his request."

i). On or aobut September 30, 1996, Cutter sent Lowery a kite informing Lowery of Cutter's recent acceptance for Membership in the Blackstar Church. Lowery advised Cutter to change his Religion of preference through Cutter's Case Manager.

j). On or about October 22, 1996, Cutter sent Lowery a kite requesting to read or purchase a copy of the new guidelines promised by Erwin in answering Grievance 9-96-8 (paragraph 42(A)(1)(h), above), and asking if these guidelines allow any of the previous requests Cutter had made. Lowery responded by telling Cutter to contact Schwarz.

k). On or about November 3, 1996, Cutter sent another Kite to Lowery, referencing Grievance 9-96-8, which directed Cutter to contact Lowery regarding these Guidelines. Lowery again responded that he could not answer Cutter's requests.

l). On or about November 11, 1996, Cutter Filed Grievance 11-96-16 regarding the failure of Schwarz to respond to the Request made in paragraph 42(A)(1)(e), above, and for failing to provide the Guidelines promised for October 8, 1996. Erwin responded by stating that he (Erwin) would sped a new Request to Schwarz, as his contact with Schwarz was to the effect that Schwarz "stated that he would review a new Request for accommodation of religious practices and make a determination." Erwin did not respond to Cutter's Complaint of the inavailability of the Guidelines promised for October 8, 1996.

m). Cutter thereafter sumitted a new Request to Erwin, which Erwin claims was sent to Schwarz on December 12, 1996.

n). On or about February 7, 1997, Cutter inquired of Erwin as to the status of the Request sunmitted December 12, 1996, which still had been unanswered. Erwin responded by stating words to the effect that "I cannot force Dr. Schwarz to answer," without making further effort in Cutter's presence to determine the status of the Request. As a result of this continued failure to answer the Request, Cutter Filed a delayed Appeal on Grievance 11-96-16 (See Exhibit 22(a), Supplemental Appendix), which has gone unanswered to date, despite that the Chief Inspector's Office twice sent letters to Cutter regarding extensions of the time limits allowed for answering.

o). On or about May 31, 1997, mistakenly believing that he had failed to Appeal Grievance 11-96-16, Cutter Filed a second delayed Appeal on this matter, which to date still has not been answered.

p). Still to date, Cutter has not been given an answer to his Requests, the two (2) Appeals of Grievance, nor has Cutter been given a place to Practice the Rites of his Religion *or* the Guidelines supposedly promised for October 8, 1996.

2). Access to Tools for Worship

a). In the letter referenced in paragraph 42(A)(1)(c), above, written to Schwarz, Cutter outlined the bare necessities needed for Cutter to Practice the Rites of his Religion if Space were provided, which were ". . . a bell, a chalice, black robes, black candles, sword, altar, and a gong." Admitting that a "sword" would be a Security concern, Cutter stated that "it can be substituted with a broom handle," adding that "I also need a necklace, cor ceremonies and to display my faith in the same manner as rosaries are displayed. The necklace shall bear an inverted cross or symbol of Baphomet." Schwarz' answer was to "work with

Chaplain Lowery," who had already passed the issue along to Schwarz, as evidenced by paragraph 42(A)(1)(b), above.

b). In the Request Filed with Lowery June 28, 1996, Cutter identified the bare necessities for the Practice of his Rites as roughly the same ones as listed in paragraph 42(A)(2)(a), above.

c). In a kite of September 30, 1996, Cutter again asked Lowery for permission to order a Pentacle Medalloin with neck chain. Cutter's Files do not contain a response to this Kite.

d). Within Grievance 11-96-16, Cutter submitted another Request to Schwarz, through Erwin, asking for roughly the same items as listed in paragraph 42(A)(2)(a), above, with the addition of a Satanigram Pendant due to Cutter's initiation into the Blackstar Church.

e). Cutter has received no response from Schwarz concerning these requested items to date, nor answer to two (2) Appeals of Grievance 11-96-16.

f). In the Kite to Lowery of October 22, 1996, Cutter had requested permission to order a Pentacle pendant, which Lowery answered that would be responded to after new Guidelines were handed down on October 8, 1996. To date Cutter has still not received a response to this request, nor access to the new Guidelines, from Lowery or other person(s).

3). Additional Withholding

a). On or about October 23, 1996, Cutter received a Decision on Withholding form from Erwin indicating that a "catalog Samuel Weiser Inc. '96" was found to be "Inflammatory," as it "'incites, aids or abets "violence" against others;" while the examples portion of

the Decision form merely indicates that the material was Withheld because of it being "occult material." Cutter timely appealled this Decision to the COPSC.

b). Cutter thereafter received a Form letter purportedly from the COPSC, dated March 4, 1997, indicating that the Samuel Weiser catalog 1996 was found to be INFLAMMATORY" by both the COPSC and the Director of the Department of Rehabilitation and Correction. This Form letter was not signed or initialled by any persons or entities.

c). Cutter has received, since March 4, 1997, the Samuel Weiser 1997 catalog, as well as several Samuel Weiser catalog supplements, none of which have caused him to "incite, aid or abet violence against others," thereby showing that the Withholding of the Samuel Weiser catalog for 1996, which is the same in form and layout to the 1997 catalog, is an exaggerated response to legitimate prison concerns, as well as a blatent attempt by a Christian majority of DoRC Personnel to suppress material not of their Religious Beliefs.

d). Cutter has attempted to mail the Samuel Weiser 1996 Catalog to this Court to be used as Evidence in this Action, but Erwin has refused to mail said Evidence to this Court due to the fact that the Court is not on Cutter's Visiting List, constituting an infringement upon Cutter's Right of Access to the Courts, as Cutter has no reliable means of having this Catalog Mailed to Court except directly from the Institution.

e). Cutter has Grieved this matter to the Chief Inspector's Office as required and allowed by O.A.C. 5120-9-31, and the Chief Inspector has upheld Erwin's Decision to not allow Cutter to mail the supposedly contraband item directly to the Court.

B). <u>LEE'S ATTEMPTS TO PRACTICE</u>

1). <u>Haircut Issue</u>

a). On or about July 9, 1996, there were at least two (2) inmates of Native American Heritage in PCI to whom the PCI Administration had given Accommodation to, allowing these Native Americans to grow their hair longer than the established "Regulation" due to their Religious Beliefs.

b). It is among LEE's deeply held Religious Beliefs that his hair is a Gift from the Goddess, and is not to be cut, except upon the Death of a Loved one or during Religious Rituals.

c). LEE did, on or about July 9, 1996, send an Informal Complaint to Alexander, informing Alexander that his (LEE's) sincerely held Religious Beliefs carried a prohibition against cutting his (LEE's) hair. LEE informed Alexander that this prohibition could be satisfied by allowing LEE to grow only a "queue" of hair.

d). On or about July 17, 1996, LEE recieved back the Informal referenced in paragraph 42(B)(1)(c), above, with an answer from Alexander that was not responsive to the sisue raised.

e). On or about July 23, 1996, LEE Filed Grievance 7-96-4, alleging, among other items, that "I am not being afforded opportunity to observe my deeply held Religious Beliefs without being threatened with Disciplinary Action." LEE further noted that "I expect that I will recieve permission to adhere to my deeply held Religious Beliefs, and will not be force to cut my hair in the future, since the Institution has made this same accommodation for at least two (2) inmates of American Indian Heritage . . . [and] . . . better treatment of one Religion shows that the restriction on

another's Faiths are not necessary to serve a compelling government interest."

f). On or about July 23, 1996, LEE showed Erwin two (2) braids of hair, approximately 8" and 11" long, that LEE had grown in secret violation of Institutional Regulations in the past, in order to satisfy LEE's Religious Faith.

g). On or about July 30, 1996, LEE received answer from Erwin to Grievance 7-96-4, which stated that LEE should meet with Lowery "'in regard to "request for Accommodation of Religious Practices"'" (hereinafter "Request").

h). On or about August 12, 1996, LEE met with Lowery for an Interview to File said Request, and to have his (LEE's) proper Religion of Preference noted in Institutional Files as "Wicca." During this Interview, LEE informed Lowery of hte nature of his (LEE's) deeply held Religious Beliefs, including that he (LEE) had the proscription against cutting his (LEE's) hair.

i). On or about August 13, 1996, LEE received a MEmo from Lowery stating that "your request to practice the Wiccan Religion *cannot* be permitted," due to a Memorandum of June 20, 1991, regarding a Study to be performed on the nature of Wicca at Orient Correctional Institution.

j). On or about September 1, 1996, during a session where LEE was being harassed and disciplined for daring to grieve Officer misconduct, LEE was asked by Captain Pringle if his (LEE's) hair was "Regulation" length. LEE told Pringle that it was not, and explained the Request Filed August 12, 1996. Pringle, after checking with Lowery, ignored Lowery's statement that "it is against Departmental Policy to cut anyone's hair

who's claiming Religious reasons until that lawsuit is settled." Pringle, however with animus to punish LEE further, confers privately with Lowery, then returns to tell LEE "go back to your Unit, report to Sgt. Carter, and get your hair cut. That's a direct order." LEE obeyed the order given.

k). On or about September 15, 1996 LEE Filed Grievance 9-96-3, alleging, among other items, that Pringle's actions of September 1, 1996, related in paragraph 42(B)(1)(j), above, were in knowing, malicious, wanton and itentional violation of LEE's First Amendment Rights. Erwin, in answering, while acknowleging that Pringle did order LEE to cut his hair, denied that there was any impropriety to the Action. LEE Appealled this Resolution of Grievance to the Chief Inspector's Office, and, on or about January 19, 1997, Menedez and Coval together signed a "Decision of the Chief Inspector" upholding Erwin's findings.

l). In answering Grievance 12-96-5/12-96-7, Coval and Menedez together stated "[a]ccording to Policy, all inmates shall conform to the department's grooming policy as stated in administrative rule 5120-9-25 . . . [y]ou will not be granted permission to grow a queue." Due to the blatent nature of this lie, On or about May 3, 1997, LEE sent, uning a Notification of Grievance form, a Complaint to Director Wilkinson, stating that "I have noted . . . that there have been at least five (5) Native American inmates in this Institution over the past two years who have been allowed the accommodation to grow their hair in accordance with their Religious Beliefs . . . and please allow me to grow my hair in accordance with my religious beliefs." This Complaint has never been answered by the Director, Wilkinson.

m). On or about October 9, 1997, LEE sent a Notification of Grievance to the Chief Inspector's Office

regarding the Director, Wilkinson, having failed to answer this Complaint submitted to his Office as noted in Paragraph 42(B)(1)(l), above. LEE has not received an answer from the Chief Inspector's Office regarding this matter.

n). On or about May 11, 1997, an Officer noted the length of LEE's hair, and claims to have ordered LEE to get a haircut. LEE did not hear such order, but was later called to the PCI A-Unit Security Office to see Sgt. Rick Stallins, who, after reviewing matters Filed in this Court, including LEE's Motion for temporary Restraining Order, did give LEE Direct Order to cut his (LEE's) hair. Sgt. Stallins at that time acknowleged that the Institution gives Native Americans Accommodation to grow their hair in accordance with their Religious Beliefs, and knew, or reasonably should have known, from reading paperwork Filed in this Matter (Case #C2-97-382) that LEE shwoed him, that is is against LEE's deeply held Religious Beliefs to cut his hair.

2). Worship Space

a). On or about October 9, 1996, LEE made verbal request of Lowery that Lowery provide LEE with space in which to Practicethe Rites of LEE's Religion. Lowery told LEE words to the effect of "Kite your Unit Manager, I can't authorize space in the Unit for you," despite that LEE had asked for any space available, not just in the Unit.

b). On or about October 10, 1996, LEE sent Informal Complaint to Unit Manager Perkins, outlining the need for space in the Unit for LEE to Practice the Rites of Wicca, and asking for accommodation in that regard. The request for a bed move to a specific area proven to ahve the necessary space was denied, while

the request for any other space was not responded to by Perkins.

c). On or about October 21, 1997, LEE Filed Grievance 10-96-12, asking for either a bed move to the area proven to ahve sufficient space for the Practice of hte Rites of Wicca, or the use of a private room when necessary for the Practice of Rites. This request was denied, and, on Appeal to the Office of the chief Inspector, was affirmed by K. L. Brown.

d). On or about December 1, 1996, LEE again requested space from Lowery to Practice the Rites of Wicca, requesting nothing "but the space, at least 9½' across, and your supervision, during the days of the Full Moon and the Days of Power, of which the next is December 21, 1996." Lowery denied this request.

e). On or about December 8, 1996, LEE requested that Lowery, himself, "hold a Yule Celebration for the Church of Wicca after sundown on December 21, 1996 . . ." LEE further noted that "this is to accommodate your *order* that I may not lead or perform such Rites myself."

f). On or about December 11, 1996, LEE Files Grievance 12-96-5, requesting the PCI "Institution Chaplain make arrangements for a Religious Leader from the Wiccan Church . . ." be allowed to perform Services fior LEE, in order to accommodate LEE's Religious Beliefs. Erwin denied this request as "contrary to DR&C Directive . . ."

g). On or about December 15, 1996, LEE Filed Grievance 12-96-7, asking that "the Chaplain's Office asssist me in contacting a local Coven to assist me in my workship if [Lowery] still refuses to allow Wicca Services or to perform them himself . . ." This request was denied by Erwin.

h). LEE has appealled Grievances 12-96-5 and 12-96-7 to the Office of the Chief Inspector, and, on or about April 14, 1997, Response was given by said Office that denied nearly all of LEE's requests made in these two (2) Grievances.

3). Tools to Practice

a). During the Interview with Lowery on or about August 12, 1996, LEE identified several items necessary for the PRactice of Wiccan Rites. These were Runes, salt, a Wand (for which a polished tree branch would do, after being consecrated through purification), a Pentacle, Herbal Teas, and a Quartz Crystal.

b). On or about October 1, 1996, LEE sent a kite to Lowery requesting "permission to order a Pentacle w/chain." Lowery's naswer was that "you will receive an answer after October 8, 1996. ODRC Religious Services Admin. will address your request."

c). On or about November 1, 1996, LEE Sent a letter to Schwarz, inquiring about hte disposition of the Request Filed, as in paragraph 42(B)(1)(h), above, to which LEE has still never received a response from Schwarz, and LEE included in said letter a statement that he (LEE) had "not been allowed to purchase a Pentacle to wear as Christians are allowed their crosses."

d). Schwarz' answer to the letter referenced in paragraph 42(B)(3)(c), above, infomed LEE that "Inmates should be able to wear a religious medal around their necks as long as it conforms to the size and value limits set . . ."

e). As a result of Schwarz' answer referenced in paragraph 42(B)(3)(d), above, LEE sent a kite to Lowery on or about December 8, 1996, asking for the "size specifications for religious medallions and/or rings

. . ." Lowery's answer of December 9, 1996, was "per the Warden, a *Pentacle* medallion will not be permitted at P.C.I. Since it is symbolic of Wiccan religious practices, which are not permitted per Central Office."

f). On or about December 15, 1996, LEE Filed grievance 12-96-7, Grieving, among other items, that "I have . . . been refused permission to purchase and have a Pentacle, although others may receive all the crosses they want." Erwin's answer was that the "Pentacle as a religious medallion is not permitted as it is symbolic of Wiccan Religious practices which are not permitted as explained . . ." previously. LEE timely Appealed this issue to the Chief Inspector, and, over four (4) Months later, received the Grievance Response noted in previous paragraphs, above.

g). In August, 1997, LEE received in a Pentacle medallion that he, LEE, personally purchased form Abyss Distributors, and which, despite the holding of the Chief Inspector's Office in GRievance 12-96-5/12-96-7, PCI Officials, clearly in an attempt to deny LEE the Religious Freedoms to which he is entitled, attempted to have LEE return this item to the Sender as "contraband," and held this item for several weeks before finally permitting this item, clearly permitted.

h). On or about January 16, 1997, LEE sent another Informal to Alexander, alleging the need for "but a few items: The right to grow my hair, in line with the Order that the Goddess has given me; a Pentacle pendant to use as "focus" during prayer sessions; Salt, a quartz crystal, and a" wand, as well as "a few books on the Craft . . . the Chaplain to hold, or allow a Coven Leader into the Institution to hold, Services . . . and the continuation of vegetarian servings . . ." Alexander's answer was that "I have previously addressed

this issue and concur with Chaplain Lowery that your requests are contrary to DR&C Directives."

43). On or about February 12, 1997, Plaintiffs herein sent a multi-page letter to Dianne Walker, newly assigned Warden of Pickaway Correctional Institution, making claim that Plaintiff's Religious Beliefs and Religious Freedoms had been, and were being, violated by Actions of Warden Walker's predecessor and/or her subordinates, and asking for an interview on this matter.

44). On or about February 14, 1997, Plaintiff LEE was told by an inmate Mail Runner that said Mail Runner had delivered the letter referred to in paragraph 43, above, to Warden Walker's Office. This letter has not been answered by Warden Walker to date, nor have Plaintiffs been informed of any change in the status of their prior requests.

45). All actions, inactions, omissions, and or other denial of the Religious Accommodations that Plaintiffs have requested are exaggerated responses to otherwise legitimate Prison and/or Institutional concerns, i.e., some Defendants claiming "Security," and/or other legitimate penological objectives, are exaggerating their response to these legitimate concerns, as there is no proof, nor is there any indication, that allowing Plaintiffs the accommodations asked for will have *any* impact on legitimate concerns, as in allocations of prison resources, Security, et cetera. *Finally* allowing Plaintiff LEE a Pentacle Medallion has not harmed any penological objective in any manner, and allowing other Accommodations requested will have the same effect, not harming any legitimate penological objective in any manner.

46). As a result of the acts and/or omissions claimed in paragraphs Fourty (40) through Fourty-Five (45), above,

Plaintiffs have had a severe burden placed on the PRactice of their respective Religious Beliefs with no compelling Governmental interest at stake, and have been unable to Practice their respective Religious Beliefs.

47). As a result of hte acts and/or omissions claimed in paragraphs Fourty (40) through Fourty-Six (46), above, Plaintiffs have been irreparably harmed and have experienced severe emotional distress and harm.

FIRST CAUSE OF ACTION

48). Plaintiffs incorporate herein by this reference, as if fully rewritten, the facts alleged in paragraphs Fourty (40) through fourty-five (45), above.

49). Defendants, acting under color of State law have, by their Practices, customs, Policies and usages, subjected Plaintiffs to deprivations of their Federally-protected rights in violation of the First, Fifth, and Fourteenth Amendments to the United States Constitution, and under law.

50). Defendants, acting alone or in conspiracy,have denied Plaintiffs FReedom of Speech and of Religion, in violation of hte First and Fourteenth Amendments to the United States Constitution.

51). Defendants, acting alone or in conspiracy, have denied Plaintiffs Equal Protection of the Laws, in violation of hteFifth and Fourteenth Amendments to the United States Constitution.

52). Defendants, acting alone or in conspiracy, have denied Plaintiffs Due Process of the Law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

53). Defendants, acting alone or in conspiracy, have denied Plaintiffs concurrent State Constitutional rights under the Ohio Constitution, Statutory Laws, and accompanying Administrative Regulations as promulgated by the Joint Committee on Agency Rule Review as the Ohio Administrative code, as well as rights Granted under Defendants own Policies, through their acts and/or omissions.

SECOND COMPLAINT

54). Plaintiff incorporates herein by this reference, as if fully rewirtten, the facts alleged in paragraphs one (1) through Twenty-one (21), above.

55). Plaintiff LEE alleges infringement upon his right to Petition the Government for a redress of Grievances, in that Plaintiff LEE has been harassed, subjected to Security Control and Shakedown, and given false Disciplinary Reports for the assertation of his (LEE's) First Amendment Right to Grieve. False Disciplinary Reports given an inamte in retaliation for asserting the Right to Grieve violate that inmate's rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, and represent a significant and atypical deprivation that may serve to increase the sentence an inmate serves, while other retaliations serve to chill the rights not only of the inmate receiving the retaliation, but the assertations of other inmates, through fear of experiencing retaliation themselves.

56). Plaintiff LEE alleges retaliation in the following incidents:

1). On or about September 14, 1997, Plaintiff LEE experienced retaliation for asserting the First Amendment right to assist other inmates in the First Amendment Forum to wit:

a). At approximately 8:00 P.M. on September 14, 1997, LEE observed Correctional Officer Chad Van Sickle shaking down other inmates in LEE's Housing Area. When Officer Van Sickle shook-down one inmate Brewer, who was not present, LEE heard Officer Van Sickle tell other inmates in the area to tell Brewer that "his area checked out o.k.," or words to that effect.

b). Officer Van Sickle then shook-down LEE's bunkmate, stating "I only need one more" to fulfill the required quota.

c). When inmate Brewer returned to his Lock shortly after, he found that Officer Van Sickle had put Brewer's neighbor's wet shower-shoes in Brewer's Locker, atop some clean clothes. Angered, Brewer sought out Officer Van Sickle to Complain.

d). Several minutes after seeing Brewer leave to complain to Van Sickle, Van Sickle returned to the area with Brewer, stating words to the effect that "since you want to complain, let's take your locker downstairs so I can give it a thorough shake-down." Because of Brewer's having been told Van Sickle's earlier statement of Brewer's area having "checked out," Brewer argued with Van Sickle.

e). In order to assist his fellow inmate, LEE quietly told this inmate, Brewer, to comply with the Officer, and "I'll help you write him up later." Officer Van Sickle heard LEE tell Brewer this.

f). Officer Van Sickle then, after more arguing, got Brewer to submit to a further shake-down.

g). Officer Van Sickle, after finishing with Brewer, then came to LEE's Lock, and told LEE to open his (LEE's) locker, to be shaken-down.

h). Officer Van Sickle, having earlier said that Brewer's Area "checked-out," clearly was acting in retaliation when shaking down Brewer the second time.

i). Officer Van Sickle, having earlier stated that he "only need[s] one more" shake-down to fulfill quota, and having left the Housing Area after having completed one more shake-down, clearly was acting in retaliation against LEE for LEE's having offered to assist Brewer to "write him up later."

j). Officer Van Sickle was, at the time of the Shakedown, in violation of several DoRC Rules, Regulations, Policies, and Procedures, but has received no Disciplinary Action against him, despite LEE's having Grieved this matter fully.

k). LEE has Filed Informal Complaint on this matter, as well as a Formal Grievance, and has appealed the Grievance response.

i). Sgt. William Coleman, the Hearing Officer mentioned in paragraph 56(2)(g), above, verbally dropped the charge of "Threats," stating that he could find nothing on the face of the Conduct Report that would constitute a threat, except a threat of legal action, which Sgt. Coleman said LEE is allow to make; Sgt. coleman then re-raised said charge of Threats after LEE continued objecting to a finding of guilty on the charges of disrespect and disobedienece, and

Sgt. Coleman then sent all three (3) charges to the Institutional Rules Infraction Board for a Hearing on the matter, stating that he hadn't done "hearing Officer duties for about two years, so I don't know what I'm doing," or words similar to those.

j). On or about September 26, 1996, LEE appeared in front of the Institutional Rules Infraction Board (hereinafter "RIB"), which was being at that time Chaired by one Captain Ron Hobbs, Defendant in the Action of *LEE v. Hobbs,* Case C2-95-821, which was before this Court and was then before the Sixth Circuit Court of Appeals.

k). Before the RIB Hearing mentioned in paragraph 56(2)(j), above, LEE further heard Board Member Sgt. Whers make the comment to Hobbs that "we're going to get sued, aren't we?"

l). Prior to the Hearing beginning, LEE asked both Hobbs and Wehrs to recluse themselves for bias. Hobbs refused to for both himself and Sgt. Wehrs, who did not respond.

m). Under O.A.C. 5120-9-06(G), "[n]o inmate shall be found guilty of a violation of a rule of conduct without some evidence of the commission of an act and the intent to commit the act."

n). No Evidence was presented to the RIB that LEE intended to commit the acts of Disrespect, Disobedience, or Threats, and witnesses brought before the RIB actually stated that there was some evidence that the Officer was not truthful in his allegations, through implication of witness statements that refuted the Officer's statements.

o). LEE was found Guilty by the RIB without there being any evidence of the intent to commit

the acts, and no evidence of having committed the acts charged.

p). LEE Appealled the Guilty verdicts through all channels available, and has had the Guilty verdicts affirmed through appeal.

1). Officer Van Sickle has followed, stared at, and – to other inmates – called LEE abusive names when LEE has been doing Legal Work for other inmates, in retaliation and in an attempt to intimidate LEE for asserting LEE's right to assist fellow prisoners in Legal matters.

2). On or about September 1, 1996, LEE experienced retaliation for asserting his First Amendment right to verbally grieve Officer misconduct, to wit:

a). On or about September 1, 1996, LEE verbally grieved an Officer smoking a cigarette in a non-smoking area, to that Officer.

b). Officer J. Leisure, the Officer mentioned in paragraph 56(2)(a), above, became abusive towards LEE, followed LEE to LEE's Housing area, and attempted to instigate an argument with LEE.

c). After several minutes of conversation, witnessed by at least two (2) other inamtes, Officer Leisure handcuffed LEE and escorted LEE out of the Housing Area.

d). LEE was thereafter placed in Security control for a period of approximately six (6) hours by Captain Pringle who maliciously took this actionto punish LEE for asserting the right to grieve Officer misconduct to that Officer.

e). LEE was released from Security Control after approximately six (6) hours, and Captain

Pringle thereafter maliciously ordered LEE to cut his hair, in violation of LEE's Religios beliefs, as further punishment for LEE's asserting the right to grieve verbally.

f). LEE Filed Informal Complaint on the above actions, and further Filed Grievance on the above actions, as well as an Appeal of the grievance, to no avail.

g). On or about September 10, 1996, LEE was called to the Hearing Officer for his Unit, and shown a Conduct Report written by Officer LEisure on or about September 1, 1996, concerning the actions alleged in paragraphs 56(2)(a) through 56(2)(e), above.

h). LEE obtained written statements from inmate witnesses to show to the Hearing Officer concerning LEE's lack of guilt concerning the charges of Disrespect, Threats, and Disobedience of a Direct Order, which were the charges on the Conduct Report mentioned in paragraph 56(2)(g), above.

3). LEE further has suffered retaliation for asserting the right to verbally grieve matters in the Institution, to wit:

a). On or about February 9, 1997, LEE was called by an Officer to be "patted down" through hands-on search. The Officer who called LEE was a female Officer.

b). LEE was not sure that the Officer was talking to him, as there was another inmate in the area to whom the Officer could have been talking, but as LEE had noted a general shakedown of most inmates leaving the Dining Hall, LEE

approached a Male Officer present, and was searched.

c). Officer Ross, the famale Officer mentioned in paragraph 56(3)(a), above, then called LEE over to her, and asked LEE why he went to the male Officer, to which LEE responded that it is a "violation of D.R.& C. Policy 401-01 for a female Officer to shakedown male inmates."

d). Officer Ross then began accusing LEE of having "spit" on her. LEE, fearing a set-up due to LEE's litigitinous activities, quickly left.

e). At approximately 11:40 A.M., some five (5) hours after the approximately 6:50 A.M. time of the incident described in paragraphs 56(3)(a) through 56(3)(d), above, LEE was taken from LEE's Housing Unit in hand-cuffs and placed in Security Control, being served a Conduct Report for "Disrespect" and "Disobedience."

f). The Conduct Report mentioned in paragraph 56(3)(e), above, stated that LEE had disobeyed, a direct order and had purposely spit on Officer Ross at approximately 7:40 A.M. on February 9, 1997.

g). At an RIB Hearing on February 10, 1997, LEE was prepared to defend against a charge occurring at 7:40 A.M., and had called witnesses to testify as to his whereabouts at 7:40 A.M., while the RIB instead verbally changed the time of the Incident to approximmtely 6:55 A.M. without giving LEE opportunity to call witnesses to testify to matter in regards to that time frame.

h). LEE defended himself against the charges as best he could, once they were changed to a different time than orriginally charged,, and even

the RIB expressed incredulity that LEE had not been placed in Security Control at the time of the incident if LEE had truely spit on the Officer, as the Conduct Report claimed he had.

i). Despite that no evidence was presented that LEE had spit on the Officer – even expressing disbelief in the charge – the RIB found LEE Guilty of the charge of Disrespect, and, despite that LEE had not known that OFficer Ross was at first speaking to LEE, and despite the fact that LEE was shaken down, the RIB Found LEE Guilty of Disobedience of a direct order, apparently through not allowing Officer Ross to do so.

j). LEE has appealed this matter to the Office of the Warden, and after having to send several kites over a matter of months and then finally resort to the Grievance procedure, LEE finally received a copy of an Appeal response purported to have been made on February 14, 1997, which upheld the RIB Findings.

k). LEE questions the validity of this Document, as LEE remembers having a conversation with Williford Gilliland, Administrative Assistant to the Warden, on or about April 10, 1997, in which Mr. Gilliland complained to LEE that he was "far behind" in his (Gilliland's) work, and was "just now getting to RIB Appeals from February."

l). LEE has, however, Appealled this Appeal response to the Director of The Department of Rehabilitation, thus exhausting LEE's Appeals in this matter.

57). Both RIB Conduct Reports mentioned in sub-paragraphs to paragraph 56, above, were given in retaliation for LEE's efforts to verbally grieve violations and/or attempts to violate Institutional Rules, by Officers, while the Shakedown and other harassment mentioned in paragraphs 56(1)(a) through 56(1)(l), above, was taken in retaliation for LEE's attempt to assist other inmates in asserting their First Amendment Rights.

58). The Conduct Reports complained of in the sub-paragraphs to paragraph 56, above, may be taken into account by the PArole Board, which may result in a lengthening of LEE's sentence at his next Parole Hearing, and even thereafter, thereby amounting to a significant and atypical deprivation that an inmate should not have to endure as a result of his committment. At Furlough Hearing on or about October 6, 1996, LEE was specifically asked about "the last ticket you got," and was asked to explain the circumstances of said "ticket" to the Parole Board Member.

59). Both conduct Reports and the retaliatory harassment violate LEE's First Amendment Right to Petition the Government for a redress of Grievances, which amount to a significant and atypical deprivation that an inmate should not have to endure due to his incarceration.

SECOND CAUSE OF ACTION

60). Plaintiff incorporates herein by this reference, as if fully rewritten, the facts alleged in paragraphs Fifty-Four (54), above, through Fifty-Nine, (59), above, inclusive.

61). Defendants have, acting under color of State Lew, subjected Plaintiff LEE to a deprivation of his First Fifth,

and Fourteenth Amendment Rights of the United States Constitution, and under Law.

62). Defendants have, by their Practices, Customs, Policies and usages, subjected Plaintiff to a substantial deprivation of his rights, and subjected Plaintiff to a significant and atypical deprivation that a Prison inmate should not have to endure as a result of his incarceration, in violation of Plaintiff LEE's First, Fifth, and Fourteenth Amendment to the United States Constitutiuon Rights, and under Law.

63). Defendants, acting alone or in conspiracy have, by their acts and/or omissions, denied Plaintiff concurrent State Statutory and/or State Constitutional Rights under the Ohio Constitution, Statutory Laws, and accompanying Administrative regulations as promulgated by the Joint Committee on Agency Rule Review as theOhio Administrative code, as well as rights Granted under Defendant's own Policies.

THIRD COMPLAINT

64). Plaintiff incorporates herein by this reference, as if fully rewritten, the facts alleged in paragraphs one (1) through Seventeen (17), above.

65). LEE has been subjected to Defendant's Agents P. Komma and J. Sexton, respectively Librarian and Assistant Librarian, reading of LEE's confidential legal materials in the PCI Library.

66). Defendant's Agents Komma and Sexton peruse inmate's Legal Papers when inmates are typing on the typewriters in the Institution Library.

67). Defendant's Agents Komma and Sexton peruse inmate's Legal Papers when inmates turn Legal Papers in for copying through the established procedure for having legal copies made through the Institutional Library.

68). Lee has no other resouce for having copies of Legal Papers made, except to use the procedure in the Institutional Library.

69). Defendant's Agents Komma and Sexton make their own judgement of what they consider "legal" when perusing inmate's Legal Papers in the Library, and both Librarian Komma and Assistant Librarian Sexton have told LEE that certain legal papers are "not legal" at different times when LEE is either typing in the Library or has turned legal papers in for copying, including that Komma has refused to make a copy of a newspapers clipping that LEE was to use in Exhausting Available remedies for Religious Freedoms concerning this Action, and LEE has been, therefore, unable to use said newspaper clipping in exhausting available remedies, which has caused LEE detriment in this matter.

70). Defendant's Agent Komma has discussed LEE's confidential legal papers with Erwin when LEE has turned confidential legal papers in for copying, including Komma discussing with Erwin Legal Papers pertaining to the instant Action.

71). Defendant's Agent Komma has refused to copy LEE's legal papers on more than one occasion, stating that Erwin said Komma "didn't have to, as they are not legal," this occurring on or about March 3, 1997.

72). LEE had to show Defendant's Agent Komma other confidential legal papers in order to convince Komma that

the Papers in question on March 3, 1997, mentioned in paragraph 71, above, were, in fact, legal in nature.

73). Defendant's agent Sexton has confiscated for "investigation" legal papers LEE had turned in for copying on or about March 14, 1997, stating that he (Sexton) was going to "send them to Erwin" because said Legal Papers had another inmate's name on them (an unpublished Decision LEE needed for citation in another Action).

74). Defendant's Agents Komma and Sexton are in posession of LEE's and other inmate's, confidential legal papers for hours, sometimes days, when inmates have to turn in confidential legal papers at the institutional Library for copying, and inmate, LEE included, have no assurance that Defendant's Agents Komma and Sexton, and/or others, are not thoroughly reading and/or copying for their own – or Departmental – use, inmate's confidential legal papers.

75). LEE has Filed Grievances concerning Defendant's Agents Komma and Sexton reading inmate's legal papers, nad LEE has been told, through Grievance and Appeal of Grievance response, that Komma and Sexton are permitted to do so for Security reasons, and that Komma and Sexton are not "reading" said legal papers, but are only "scanning" them to determine that they are, in fact, legal in nature. According to Defendant's Agent Sare Kavak, "[t]he Librarian has the right to *glance* at paperwork to determine of they are legal work."

76). Defendant's Agents Komma and Sexton normally have no knowlege of what, or what type of, legal actions LEE is pursuing, and therefore cannot tell "at a glance," or even through thorough reading, whether the materials they are viewing is, in fact, for a current, pending, or

anticipated Legal Action. Defendant's Agents Koma and Sexton have no specialized training in the Law and therefore have no legal basis or professional background upon which to base a decision that some certain paperwork is "legal" in nature or not.

77). The Actions of Komma and Sexton related in paragraphs Sixty-Four (64) through Seventy-Six (76), above, are in violation of the right of confidentiality that inmates have in their legal papers when pursuing their right of Access to the Courts and to Petition the Government for a redress of Grievances.

78). The actions of Komma and Sexton related in paragraphs above are in violation of inmate's right to Freedom of Speech, in that inmate's speech may be chilled or silenced through the unauthorized reading and/orthrough the refusal to copy confidential legal papers.

THIRD CAUSE OF ACTION

79). Plaintiff incorporates herein by this reference, as if fully rewritten, the facts alleged in paragraphs sixty-four through Seventy-Eight, above.

80). Defendants, acting under color of State Law have, by their practices, customs, Policies and usages, subjected LEE to deprivations of his Federally-Protected rights in violation of the First and Fourteenth Amendments to the United States Constitution, and under Law.

81). Defendants, acting alone or in conspiracy have, by their acts and/or omissions, denied LEE concurrent State Constitutional Rights under the Ohio Constitution, State Statutory Laws, and accompanying AdministrativE Regulations as promulgated by the Joint Committee on

Agency Rule Review as the Ohio Administrative Code, as well as rights granted under Defendant's own Policies.

82). Defendants, acting under color of State Law have, by their Practices, customs, Policies and usages, subjected LEE to deprivations of the Federally-Protected Right of Due Process of the Laws through interfering with Legal Work and Copying.

FOURTH COMPLAINT

83). Plaintiff incorporated herein by this reference, as if fully rewritten, the facts alledged in paragraphs one (1) through seventeen (17), above.

84). Plaintiff LEE is a non-smoker, who has been diagnosed through "PPD" testing as having been exposed to Tuberculosis during his incarceration. Plaintiff LEE has a severe psychological fear of further Lung damage, and has asked to be Housed in non-smoking Areas.

85). Defendants, within Plaintiff LEE's current Housing Area, provide two (2) supposedly non-smoking Housing Areas. Both Housing Areas also have smokers living in them.

86). There is smoking in the non-smoking Housing Areas, both by smokers who live in them, and by smokers who go "out of place" into the non-smoking Housing areas. Plaintiff LEE has Filed many Grievances about the presence of smokers in the non-smoking Housing Areas, and of smokers smoking in the non-smoking Housing areas.

87). Smokers are still moved into the non-smoking Housing Areas.

88). Television Bays and Hallways of LEE's Housing Area are designated as non-smoking Areas.

89). Inmates and Officers regularly smoke in the Television Bays and Hallways of LEE's Housing Area. LEE has Filed numerous Grievances concerning both Officers and inmates smoking in these Areas.

90). PCI Officers rarely enforce the non-smoking Regulations on inmates in the Hallways and Television Bays of LEE's Housing Area (A-Unit). Officers are not repremanded and ordered to stop when caught smoking by their Superior Officers, in non-smoking Areas.

91). LEE has Filed numerous Grievances on Officers smoking in the non-smoking Areas of A-Unit, and was told by Erwin that Officers are allowed to smoke in these non-smoking areas, including Hallways, Television Bays, *and* non-smoking inmate Housing Areas.

92). LEE has suffered dizziness, nausia, headaches, and other physical symptoms of illness as a result of breathing cigarette and/or cigar smoke in these supposedly non-smoking Areas.

93). LEE is in great fear of sustaining further Lung damage as a result of breathing smoke in these supposedly non-smoking Areas.

94). The Eighth Amendment to the United States Constitution says that inmates shall not be subjected to cruel and unusual punishment, while *Helling v. McKinney,* 113 St. Ct. 2475, states that prison officials may *not* "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering next week or month or year." *Id.*, at 2480. Also, "the eighth amendment protects against future harm to inmates . . ." *Id.*

95). There is a serious, substantial likelihood that LEE will continue to be exposed to unreasonably high risks of contracting smoking related illnesses as a result of the exposure to second-hand tobbacco smoke that he is subjected to, and that PCI Officials will continue Housing smokers in non-smoking Housing Areas; That smokers will continue to smoke in non-smoking Housing Areas, Television Bays, and Hallways; That Officers will continue to fail to enforce non-smoking Regulations in non-smoking Areas; And that LEE's mental and physical health will continue to be adversely affected by the smoking in non-smoking Areas, which includes, but is not limited to: Inmate sleeping Areas; Hallways; Television Bays; Card and/or Study Rooms; and any and all other locations where inmates may gather and/or be located, throggh Administrative Action or otherwise.

96). Defendants consistently fail to provide Staffing levels sufficient to provide coverage of all inmate Housing areas often enough to enforce non-smoking Regulations.

97). Defendants have resources at their command with which to identify smokers and/or buyers of tobbacco products. Individual Officers have personal knowlege of smokers living in the non-smoking Housing Areas.

98). Defendants consistently fail to use the resources available, and/or refuse to use said resources, to identify smokers and/or buyers of tobacco products. Defendants fail to Order their Officers to identify and remove smokers from non-smoking Housing Areas.

99). Defendants allow known smokers to continue to reside in non-smoking Housing Areas after their status as a smokers has been determined.

100). Defendants have asked LEE to identify smokers for them, knowing that LEE's being labeled as a "snitch" could lead to LEE's being physically harmed by other inmates.

101). It is an Eighth Amendment violation to premise an inmate's protection from harm, even from the harm of cigarette smoke, on his having to "snitch."

FOURTH CAUSE OF ACTION

102). Plaintiff, incorporates herein by this reference, as if fully rewritten, the facts alleged in paragraphs Eighty-three (83) through One Hundred and one (101), above.

103). Defendants have, acting under color of State Law, by their practices, customs, Policies and usages, subjected the Plaintiff, LEE, to an unreasonable risk of harm to his health through unwilling exposure to high levels of tobacco smoke, in violation of the eighth amendment to the United States Constitution, and under Law.

104). Defendants have acted with deliberate indifference to the prevasive, known risk of harm that Plaintiff may suffer from unwilling exposure to tobacco smoke, in violation of the Eighth amendment to the United States Constitution, and under Law.

105). Defendants have, by their wrongful, malicious, intentional acts and/or omissions, subjected Plaintiff to a substantial risk of harm to plaintiff's future health as a result of unwilling exposure to high levels of environmental tobacco smoke.

106). Defendants have, by their acts and/or omissions, denied Plaintiff concurrent State Constitutional rights under the Ohio Constitution, State Statutory Laws, and

accompanying Administrative Regulations as promulgated by the Joint Committee on Agency Rule Review as the Ohio Administrative Code, as well as rights Granted under Defendant's own Policies, Rules, and Procedures.

FIFTH COMPLAINT

107). Plaintiff incorporates herein by this reference, as if fully rewritten, the facts alleged in paragraphs one (1) through seventeen (17), above.

108). Defendants have, in an exaggerated response to legitimate Prison concerns, violated Plaintiff LEE's Constitutional Right to posess legitimate, non-inflammatory Printed materials, by designating said materials "Inflammatory," and denying LEE the right to posess said Printed Materials, to wit: one Eight-page pamphlet from the Prisoner's Rights Group "P.R.O.G.R.E.S."

109). Plaintiff LEE asserts the following sequence of events regarding said P.R.O.G.R.E.S. pamphlet, volume I Number I;

A). On or abbut June 4, 1996, LEE received in through "legal mail" an envelope from an organization using the name P.R.O.G.R.E.S. The postmark date on said envelope was some three (3) weeks proir, or more,

B). Inside the envelope mentioned in paragraph 109(A), above, was one issue of the P.R.O.G.R.E.S. Volume I, nmuber I, newsletter/pamphlet, which contained an article about the Pickaway Correctional Institution, where Plaintiff LEE is Housed, as well as other, general information on the Ohio Department of Rehabilitation and Correction.

C). LEE showed this pamphlet to other inmates, one of whom, Derricking, took said pamphlet to the Institutional Library to have copies made through the System there.

D) On or about June 6, 1996, LEE was told by another inmate that D. King, as well as several other inmates, were in "Security Control" for investigation of "illegal copies" for posessing said P.R.O.G.R.E.S. pamphlet. LEE, knowing that the copies D. King made were legal, stepped forward and made a written statement through the PCI Captain's Office to that effect, also surrendering his (LEE's) copy of the P.R.O.G.R.E.S. pamphlet so that Institutional Officials would have the original for their investigation.

E). On or about June 21, 1996, LEE was given a pass to the Office of the Inspector of Institutional Services, wherein Acting IIS Deborah A. Timmerman-Cooper, after handling several other matters, came to said P.R.O.G.R.E.S. pamphlet. When she was uncertain as to what to do with said pamphlet, her husband, also present, Lt. Cooper, PCI Gang (Security Threat Group) Coordinator, said words to the effect that "they want to Withhold it from him." Mrs. Timmerman-Cooper admitted not having read said P.R.O.G.R.E.S. pamphlet, and was uncertain of what criterion or criteria of those allowed under O.A.C. 5120-9-19 to use. Lt. Cooper, after looking over the choices, pointed to, "'Incites, aids or abets "violence" against others'", one of the Inflammatory designations. LEE requests Review.

F). On or about July 3, 1996, LEE received from Acting IIS Timmerman-Cooper a Decision form, which again states that said P.R.O.G.R.E.S. pamphlet is "Inflammatory," as it "'Incites, aids or abets "villence" against other.'" LEE requests Review by the COPSO.

G). On or about August 5, 1996, while talking with D. King, LEE discovers that the copies of the P.R.O.G.R.E.S. pamphlet in his (King's) posession were not confiscated or otherwise Withheld from him. In givng LEE an DECLARATION TO THAT EFFECT, King also allowed LEE the use of one (1) copy of his (King's) P.R.O.G.R.E.S. pamphlet to copy the wording from. LEE has been in continuous posession of the *wording* of the P.R.O.G.R.E.S. pamphlet since that time.

H). On or about September 16, 1996, LEE received a September 6, 1996 Memo purportedly from the COPSC, stating that the P.R.O.G.R.E.S., January, 1996, pamphlet "should be excluded from the institution as the material was found to be INFLAMMATORY as defined by Administrative Regulation 5120-9-19." This letter stated that said Decision was "determined by the Publication Screening Committee and the Director of the Department of Rehabilitation and Correction," Mr. Wilkinson.

I). On or about September 25, 1997, LEE met with IIS Erwin to mail the P.R.O.G.R.E.S. pamphlet from the Institution. At that time, LEE told Erwin that he was in posession of the wording of the P.R.O.G.R.E.S. pamphlet, to which Erwin replied there was "no problem," that LEE could posess the wording of the pamphlet, but not the pamphlet itself.

J). LEE's visitor has never received the mailed-out P.R.O.G.R.E.S. pamphlet, and LEE's Account has never been charged for any postage for mailing out the P.R.O.G.R.E.S. pamphlet. LEE has never received a copy of the cash slip for postage. Despite this, Erwin claims that the Mailroom records show the pamphlet was mailed to LEE's visitor.

110). The P.R.O.G.R.E.S. pamphlet, Vol. 1, No. 1, in no way incited, aids, or abets "violence" against another,

111). The only course of action that the P.R.O.G.R.E.S., Vol. 1, No. 1, proposes is that, because "no one can assert your rights for you – YOU must assert your own rights." The P.R.O.G.R.E.S., Vol. 1, No. 1, pamphlet gives a list of Officials' names so that persons can "receive more information and/or . . . lodge a complaint with the appropriate listed agency."

112). Prison Officials have acted maliciously in Withholding the P.R.O.G.R.E.S., Vol. 1, No. 1, pamphlet from LEE, having no basis except their own distaste towards the information provided therein.

FIFTH CAUSE OF ACTION

113). Plaintiff incorporates herein by this reference, as if fully rewritten, the facts alleged in paragraphs One-hundred and Seven (107) through One-hundred and Twelve (112), above.

114). Defendants, acting under color of State Law have, by their practices, customs, policies and usages, subjected Plaintiff LEE to deprivations of his Federally-protected rights, in violation of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and under Law.

115). Defendants, acting alone or in conspiracy have, through their malicious act of Withholding non-Inflammatory materials from Plaintiff LEE, denied Plaintiff LEE Freedom of Speech, in violation of the First and Fourteenth Amendments to the United States Constitution.

116). Defendants, acting alone or in conspiracy have, through their intentional acts, denied Plaintiff Equal Protection of the Laws, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

117). Defendants, acting alone or in conspiracy have, through their intentional acts, denied Plaintiff Due Process of the Laws, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

118). Defendants, acting alone or in conspiracy, have, by their acts and/or omissions, denied Plaintiff concurrent State Constitutional Rights under the Ohio Constitution, Statutory Laws,, and accompanying Administrative Regulations as promulgated by the Joint Committee on Agency Rule Review as the Ohio Administrative Code, as well as rights Granted under Defendant's own written Policies.

SIXTH COMPLAINT

119). Plaintiff incorporates herein by this reference, as if fully rewritten, the facts alleged in paragraphs one (1) through Seventeen (17), above.

120). Defendants have, through their knowing use of Life and Health-threatening paints, subjected Plaintiff LEE, and all other inmates in the Pickaway Correctional Institution, to an unreasonable risk of harm to their current and future health, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, to wit:

A). On or about October 10, 1996, Plaintiff LEE, on returning to his Housing Area from his Job, noted a strong odor of paint fumes in his Housing Area,

coming from the Black Paint used on the floor and radiators. LEE experienced nose and throat irritation, as well as a hadache and dizziness as a result of breathing the paint fumes present in his Housing Area.

B). LEE checked the labels on cans of paint being used to paint the radiators and floors in his Housing Area, and noted that they contained the warning that "(v)apor harmful. May affect the brain or nervous system causing dizziness, headache or nausia. Causes eye, skin, nose and throat irritation." This paint was specifically labelled as "Yenkin Farm & Fleet Equipment Emamel." Other paints were also being used, labelled with similar warnings.

C). LEE Filed Grievance on this matter, and exhausted all available remedies within the DoRC, and these harmful paints are still being used within the Housing Areas of PCI, causing LEE and other inmates symptons such as headaches, dizziness, nausia, nose and throat irritation, as well as other symptoms.

D). Some permanent damage to the brain or central nervous system may result from breathing certain paint fumes of the types of paints being used in the inmate Housing Areas, and some brain or central nervous system damage may not be apparent for substantial lengths of time after being exposed.

E). DoRC Officials have shown deliberate indifference to inmate health by exposing, and continuing to expose, the inmates, LEE included, to paint fumes known to cause brain and central nervous system damage.

121). DoRC Officials lock inmates in housing Areas for hours during the and overnight, while exposing the inmates to fresh fumes from these harmful paints.

122). Defendant's own Policies specifically admit that there is insufficient airflow in the Housing Areas of PCI, and reduced airflow can cause inmates additional exposure to said paint fumes, above and beyond the norm that causes minor damage.

123). PCI Officials continue to lock inmates in Housing Areas where these harmful paints have recently been used, and where harmful paint fumes are present.

SIXTH CAUSE OF ACTION

124). Plaintiff incorporates herein by this reference, as if fully rewritten, the facts alleged in paragraphs One-hundred and Nineteen (119) through One-hundred and Twenty-three (123), above.

125). Defendants, acting under color of state law, have, by their practices, customs, policies and usages, exposed Plaintiff LEE to an unreasonable risk of harm to his current and future health, through unwilling exposure to harmful paint fumes, in violation of the Eighth Amendment to the United States Constitution, and under Law.

126). Defendants have acted with deliberate indifference to the known, pervasive risk of harm that Plaintiff may suffer from unwilling exposure to health-damaging paint fumes, in violation of the Eighth Amendment to the United States Constitution, and under Law.

127). Defendants have, by their wrongful, wanton, malicious and intentional acts and/or omissions, subjected Plaintiff to a substantial risk of harm to Plaintiff's health, through brain and central nervous system damage, as a result of unwilling exposure to health-damaging paint

fumes, in violation of the Eighth Amendment to the United States Constitution, and under Law.

128). Defendants have, by their acts and/or omissions, denied Plaintiff concurrent State Constitutional rights under the Ohio Constitution, State Statutory Laws, and accompanying Administrative Regulations as promulgated by the Joint Committee on Agency Rule Review as the Ohio Administrative Code, as well as rights granted under Defendant's own Policies, Rules, and procedures

REQUESTED RELIEF

129). Wherefore, for the acts and/or omissions of Defendants within the First Complaint, Plaintiff Cutter hereby requests:

1). Immediate posession of all materials Withheld from Cutter as "Inflammatory," and;

2). The sum of $666.00 per item Withheld from Cutter, and;

3). The sum of $666.00 per day, for each day, for each item, that each item has been Withheld from Cutter in violation of Cutter's First Amendment Rights, and;

4). The sum of $666.00 per day for each item requested to be provided Cutter by the Administration, including, but not limited to, reading materials, the Satanic Bible, The Satanicon, and/or any and all other Religious/Inspirational Literature which Cutter has requested to be provided in the same manner in which the Administration provides inmates of other Religions with the Printed Materials of their Faiths, and;

5). That the Administration provide Cutter immediate access to all such materials requested, such as they provide access to materials requested by members of more "approved of" Religious Faith groups, and;

6). Access to Space and Tools with which to Worship, including, but not limited to, access to a bell, a chalice, Black Robes, Black candles (and/or small light bulbs), a sword symbol such as a broomstick or other instrument of proper length, altar, gong, and a medallion of Baphomet, and;

7). Any and all other relief such as this Court may see fit to Grant.

130). Wherefore, for the acts and/or omissions of Defendants withijthe First Complaint, Plaintiff LEE hereby requests:

1). Immediate posession of all materials Withheld from LEE as " Imflammatory," and;

2). The sum of $555.00 per item Withheld from LEE, and;

3). The sum of $555.00 per day, for each item, for each day that each item has been Withheld from LEE in violation of LEE's First Amendment Rights, and;

4). The sum of $555.00 per day for each item requested to be provided LEE by the Administration, including, but not limited to, reading materials, Religious/Inspirational Literature, and other written Religious Materials dealing with Wicca that LEE has requested to be provided in the same manner in which the Administration provides inmates of other Religious Faith Groups with the Printed Materials of their Faiths, and;

5). That the PCI Administration provide LEE immediate access to all such materials requested, such as they provide access to materials requested by members of more " approved off Faith Groups, and;

6). Access to Space and Tools with which to Worship, including, but not limited to, the Institution's immedi ately providing a contract with a Bona Fide Coven Leader from outside the Institution to enter into the Institution on at least the necessary twenty-one (21) times per year that Wicca has Sabbats and Esbats, in order to Minister to LEE and other Wiccans at those times, and to properly see to Wiccan Needs, and;

7). Access to the necessary Religious Space and Tools individually, in order that LEE may worship at times when the Coven Leader is not available, the Tools necessary including, but not being limited to, Runes, Salt, a Wand, a Pentacle,, Herbal Teas and a Quartz Crystal, andany and all other Tools as may become necessary during LEE's course of instruction by the Coven Leader contracted, and;

8). The sum of $555.00 per day for each day, for each item, that LEE is denied access to Religious Counsel and/or instruction and/or Leadership, and to the Tools of Wicca with which to properly Practice Wicca, and;

9). An immediate injunction preventing Institutional and/or Departmental Personnel, and/or any and all other persons and/or entities who may gain control over any aspect of LEE's current Incarnation, crom cutting, or Ordering LEE to cut, LEE's hair, and;

10). The sum of $55,555.00 personally from Defendant Pringle for the malicious, intentional act of using a violation of LEE's Religious Beliefs as punishment in the Institutional setting, and;

11). The sum of $55,555.00 in his Official capacity from Defendant Pringle for the malicious, intentional act of using a violation of LEE's Religious Beliefs as punishment in the Institutional setting, and

12). The sum of $5,555.00 personally from Defendant Stallins for the malicious, intentional act of violating LEE's Religious Freedoms and Equal Protection Rights by forcing LEE to submit to a haircut, and;

13). The sum of $5,5 55.00 in his Official capacity from Defendant Stallins for the malicious, intentional act of violating LEE's Religious Freedoms and Equal Protection Rights by forcing LEE to submit to a haircut, and;

14). Any and all other Relief such as this Court may see fit to Grant.

131). Wherefore, for the acts and/or omissions of Defendants within the Second Complaint, Plaintiff LEE hereby requests:

1). An immediate injunctio n preventing Institutional Officials, and/or any and all other persons and/or entities who may gain control over any aspect of LEE's current Incarnation, from harassing, attempting to harass, intimidating, attempting to intimidate, or writing any Disciplinary Report on LEE's Conduct for the legitimate, peaceful, and Constitutional assertation of the First Amendment Right to Grieve, and;

2). An immediate Court Order Expunging the Conduct Reports of September 1, 1996 and February 9, 1 997, and;

3). The sum of $55,555.00 personally from Defendant Van Sickle for the malicious, knowing, and wanton act of retaliation against LEE for offering assistance in the First Amendment forum to another inmate, which constitutes an infringement not only upon the First Amendment Rights of LEE, but of the inmate to whom the offer was made, and;

4). The sum of $55,555.00 in his Official capacity from Defendant Van Sickle for the malicious, intentional, and knowing act of wanton retaliation against LEE for offering assistance in the First Amendment forum to another inmate, which constitutes an infringement not only upon the First Amendment rights of LEE, but of the inmate to whom the offer was made, and

5). Any and all other relief which this Court may see fit to Grant.

132). Wherefore, for the acts and/or omissions of Defendants within the Third Complaint, Plaintiff LEE hereby requests:

1). An immediate Injunction preventing Defendants, their Agents, Employees, Representitives and Successor(s) in Office from the Practice of continuing to maintain the Policy of having inmate turn in their confidential Legal M aterials to Defendant's Agents to have copies made, where the Policy is instituted in such a manner that the inmates have no confidentiality in their legal materials and where inmates have no confidentiality – assured guarantee, or any assurances that Defendants Agents Komma and Sexton, and/or others, are not producing extra copies of said Legal Materials for Defendants' own use, or reading said legal materials when holding them for copying, and;

2). An immediate injunction preventing Defendant's Agents Komma and Sexton, and/or others acting in any capacity to copy inmate's legal materials, from "scanning," viewing, perusing, and/or otherwise taking note of any items being submitted for copying, and/or any items being typed, which has, and will continue to, violte the confidentiality of inmates' confidential legal materials, and;

3). The sum of $555.00 per incident for the several incidents in which Defendant's Agents Komma and Sexton have viewed, read, Withheld for "Investigation," and/or otherwise "glanced" at or purposely read or viewed and/or made any decision on the legal nature of LEE's confidential Legal Materials when said Legal Materials have been submitted for copying and/or were viewed by Sexton and/or Komma during LEE's efforts to type, and;

4). An immediate Injunction preventing Defendant's Agents Komma and Sexton, and/or any and all other persons acting in any capacity, from making any decisions concerning whether or not LEE's confidential Legal Materials being submitted for copying, and/or being typed, fit their own view of whether that item being submitted for copying, or being typed, is "legal" in nature, and that Defendants be Ordered to copy, without viewing in any manner the contents of, any Legal Materials being submitted by LEE and/or any and all other inmates, and that Defendants be Ordered that Defendant's Agents Komma and Sexton, and or any and all othe other persons acting in any capacity, will refrain from "glancing" at or otherwise viewing any confidential Legal Materials belonging to any inmate(s) in the Pickaway Correctional Institution.

133). Wherefore, for the acts and/or omissions of Defendants within the Fourth Complaint, Plaintiff LEE hereby requests:

1). That Defendants are immediately enjoined from continuing their Policy of H ousing Smoking inmates in non-smoking Housing Areas, and;

2)1 That Defendants are immediately enjoined from continuing to move smoking inmates into non-smoking H ousing B ays, and;

3). That Defendants are enjoined from reducing the current number of non-smoking Housing Bays, and that, if there are not enough non-smoking inmates to fill the available bed in the non-smoking Housing Bays that Defendants will not fill these empty beds, even on a temporary basis, with smoking inmates, and;

4). That Defendants are enjoined from their current Practice and Policy of not taking Disciplinary Action against Officers, Employees, and/or any and all Staff and/or other persons working in the Pickaway Correctional Ground, even on a temporary basis, and that Defendants are Ordered to accept legitimate Complaints of Staff smoking in non-smoking Areas as basis for Disciplinary Action, even when such Complaints come from inmates, and;

5). That Defendants are enjoined from their current practice and Policy of failing to enforce non-smoking Regulations on inmates in the Hallways, Television Bays, Card Rooms, and any and all other designated non-smoking Areas of the Pickaway Correctional Institution, and;

6). That Defendants are Ordered to make smoking in a non-smoking Area an offense punishable by a minimum of ten (10) unpaid days off work for Staff,

and a minimum of placement in Security Control for inmates, and;

7). That Defendants are Ordered to pay Plaintiff LEE the sum of $55,555.00 dollars in Compensatory Damages for the Physical and psychological damage done Plaintiff LEE through being Housed in non-smoking Areas where there are smokers present who were smoking during each of the days that these smokers were present and living in these designated non-smoking Areas, and that Defendants. are further Ordered to pay Plainti ff LEE the sum of $55,555.00 in Punitice Damages for the Physical and Psychological damage done Plaintiff through being Housed in non-smoking Areas in which smokers were, and are, present, which smokers smoked and smoke in the non-smoking H ousing Bays to this day, and that Defendants are further Ordered to pay Plaintiff LEE the sum of $55,555.00 in Punitive Damages for their failure to remove the non-smoking inmates of Pickaway Correctional Institution from the pervasive risk of known harm that is done through the exposure to smoke in second-hand form after Plaintiff LEE Filed numerous Grievances on the matter of smoking inmates being H oused in non-smoking Bays, and Defendants continued to not only allow smokers to remain in the non-smoking Housing Bays, but continued moving smoking inmates into the non-smoking Housing Bays after these numerous Complaints and Grievances, which Practice of moving smoking inmates into the non-smoking Housing Bays continues to this day, and;

8). That Defendants are Ordered to pay Plaintiff LEE the sum of $55,555.00 in Compensatory Damages for the Physical and Psychological harm and damage done Plaintiff LEE by Officers, Employees,

and other Staff Members – whether on a permanent, temporary or contract basis – smoking in designated non-smoking Areas of the Pickaway Correctional Institution, including the non-smoking Housing Bays, and that Defendants are Ordered to pay an additional $55,555.00 in punitive damages to Plaintiff LEE for the physical and psychological harm and damage done to plaintiff LEE by Officers, Employees, and other Staff Members smoking in designated non-smoking Areas of the Pickaway Correctional Institut ion, including non-smoking Housing Bays, and;

9). That Defendants are Ordered to pay the sum of $55,555.00 to the local branch of the American Cancer Society, or other like Public Service Organization, in Punitive Damages, for Defendants' failure to H ouse non-smoking inmates in non-smoking Housing Bays that were, – and are – truely smoke-free, and an additional $55,555.00 in Punitive Damages for forcing non-smoking inmates to live in smoking Areas and smoking Housing Bays while on a "waiting list" for a bed in a non-smoking Housing Area when there were – and are – beds in non-smoking Housing Bays assigned to smoking inmates.

134). Wherefore, for the acts and/or omissions of Defendants contained within the Fifth Complaint, Plaintiff LEE hereby requests:

1). The sum of $55,555.00 in Compensatory Damages from each Defendant found to have an active part, or who is shown to have actively participated in, in Withholding the P.R.O.G.R.E.S. Vol. 1, No. 1, Pamphlet from Plaintiff LEE, and;

2). The sum of $55,555.00 in Punitive Damages from each Defendant found to have taken an active part in, or who is shown to have actively participates in, Withholding the P.R.O.G.R.E.S. Vol. 1, No. 1, Pamphlet from Plaintiff LEE.

135). Wherefore, for the acts and/or omissions of Defendants contained within the Sixth Complaint, Plaintiff LEE hereby requests:

1). The sum of $55,555.00 in compensatory damages from each Defendant found to have an active part, or particapatory knowlege of, use of health damaging pai nts in the inmate Housing Areas of Pickaway Correctional, or who gained knowlege of such use and failed to act tō protect the health of i nmates in the Pickaway Correctional Institution, and;

2). The sum of $55,555.00 in punitive damages from each Defendant found liabile in this matter of use and/or failure to stop using health-damaging paints in the Inmate Housing Areas of Pickaway Correctional

136). Wherefore, Plaintiffs respectfully request Trial by Jury on the above matters, to establish liability of each Defendant, and to relieve Plaintiffs from the above noted violations of Plaintiffs' Constitutional and Statutory Rights, and to receive Award of the requested Relief, as well as any and all other Relief which may be appropriate and necessary.

137). Plaintiffs herein, by their signatures below, do hereby declare under penalty of Perjury that the foregoing is true and correct to the best of their knowlege and belief.

/s/ Jon B. Cutter
Plaintiff Jon B. Cutter
#A267-858
Pickaway Corr. Inst.
P.O. Box 209
Orient Ohio 43146-0209

11-8-97
Date

/s/ [Illegible]
Plaintiff LEE
a.k.a. Inmate Hampton
#A154-328
Pickaway Corr. Inst.
Box 209
Orient Ohio 43146-0209

11-8-97
Date

SERVICE

I hereby CERTIFY that a copy of the foregoing First Amended Complaint was sent to Counsel for the Defendants, Paula Luna Paoletti, this 9th day of November, 1997; and that two (2) additional copies of said First Amended Complaint were sent to the Clerk of Courts with attached Summons in a Civil Action and U.S. Marshall's Service Form for Service on added Defendants Stallins and Van Sickle this same 9th day of November, 1997.

Respectfully submitted,

/s/ Lee

LEE – Plaintiff Pro Se
a.k.a. Inmate H ampton
#A154-328
P.O. Box 209
Orient Ohio 43146-0209

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEE, et al.	:	
Plaintiffs	:	Case No C2-97-382
v.	:	Judge Graham
Wilkinson, et al.	:	Magistrate Judge Abel
Defendants	:	

[Pro Se]

SECOND AMENDED COMPLAINT

(Filed OCT 31, 2000)

1.) Plaintiffs, by this reference, incorporate herein as if fully re-written, the facts and complaints and causes of action in Plaintiff's *First Amended Complaint* of November 14, 1997.

2). Defendants did and do receive Federal Financial Assistance for Programs and Activities affected by Actions Complained of herein, and;

3). Defendants Actions affected interstate commerce, and;

4). Defendants actions, while burdening Plaintiff's Religious Exercise, were not in furtherance of a compelling government interest, and;

5). Defendant's actions were not the least restrictive means of furthering any compelling interest that they may be able to bring forth, and;

6). Defendant's actions, therefore, were in violation of the *Religious Land Use and Institutionalized Persons Act of 2000*, Section 3, *Protection of Religious Exercise of Institutionalized Persons*, *et seq*, and;

7). Plaintiffs herein bring this Action, in addition to claims asserted in Plaintiff's *First Amended Complaint*, under protection of the *Religious Land Use and Institutionalized Persons Act of 2000.*

Respectfully submitted,

/s/ [Illegible]
LEE – Plaintiff Pro Se
a.k.a. Inmate hampton
#A154-328 JA
Ross Correctional Institution
P.O. Box 7010
Chillicothe Ohio 45601-7010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN W. GERHARDT,	:	
Plaintiff,	:	CASE NO. C2-95-517
-vs-	:	JUDGE SARGUS
ALAN LAZAROFF et al.,	:	Magistrate Judge Kemp
Defendants.	:	

THIRD AMENDED COMPLAINT

(FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES; DEMAND FOR JURY TRIAL)

Introduction

1. This is an action for declaratory judgment and injunctive relief and for damages pursuant to 42 U.S.C. §1983; the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States; and the comparable provisions of the Constitution and laws of Ohio. It is brought to redress deprivations of the rights of the plaintiff – and to prevent future violation of those rights – caused by the defendants' (a) refusal to permit Mr. Gerhardt to receive certain literature from the Christian Identity Church, (b) refusal to permit Mr. Gerhardt to organize and participate in Christian Identity religious services, and (c) retaliation against Mr. Gerhardt for his efforts to engage in the free exercise of his religion. Each of the paragraphs in the complaint incorporates the other paragraphs.

Jurisdiction

2. Jurisdiction of this action is based on 28 U.S.C.§§1331, 1343, and 1367(a), 42 U.S.C. §1983, and applicable provisions of Ohio law.

3. Declaratory and injunctive relief, damages, costs and attorneys' fees are sought pursuant to 28 U.S.C. §§2201 and 2202, 42 U.S.C. §§1983 and 1988, and applicable Ohio law.

Venue

4. This action properly lies in the Southern District of Ohio, Eastern Division at Columbus, pursuant to 28 U.S.C. §1391(b) and S.D. Ohio L.R. 3.3(b) because the Defendants are found and reside in this judicial district, and because the events or omissions that are the subject of this action occurred in Pickaway County, Ohio.

Parties

5. The plaintiff, John W. Gerhardt, is a citizen of the United States and the State of Ohio. He presently resides in the Orient Correctional Institution in Pickaway County.

6. Defendant Alan Lazaroff is the Warden of Orient Correctional Institution, which is operated by the Department of Rehabilitation and Correction of the State of Ohio. His principal place of business is in Pickaway County, Ohio. At all relevant times, he has acted under color of state law. Defendant Lazaroff is sued in his individual and official capacities with regard to the declaratory and injunctive relief sought, and in his individual capacity with regard to the claims for damages.

7. Defendants Jack Taylor and June Coleman are employees of Orient Correctional Institution, which is operated by the Department of Rehabilitation and Correction of the State of Ohio. Their principal place of business is in Pickaway County, Ohio. At all relevant times, they have acted under color of state law. Defendants Taylor and Coleman are sued in their individual and official capacities with regard to the declaratory and injunctive relief sought, and in their individual capacities with regard to the claims for damages.

8. There are an unknown number of John and Jane Doe defendants who are or have been employees of the Orient Correctional Institution or are otherwise employed by the Department of Rehabilitation and Correction or the State of Ohio; their identities are not known with certainty to the Plaintiff at this time, but they will be identified during the course of this litigation. Their principal places of business are in Pickaway and Franklin Counties, Ohio. At all relevant times, they have acted under color of state law. These Doe defendants are sued in their individual and official capacities with regard to the declaratory and injunctive relief sought, and in their individual capacities with regard to the claims for damages.

Facts

9. John W. Gerhardt is a member of the Church of Jesus Christ Christian ("Christian Identity Church" or "Church") which is headquartered in Hayden Lake, Idaho.

10. In 1973 he was ordained as a minister through the Mountain Church of Jesus Christ, of Howell, Michigan. Subsequently, he was ordained as a minister by the Christian Identity Church.

11. The Christian Identity Church asserts religious doctrines which it believes are based upon the Holy Bible. Included among its biblically-based doctrines is a belief in the separation of the races. Mr. Gerhardt is a Caucasian of non-Jewish descent.

12. The Church issues several publications, including but not limited to *The Way*, it Prison Outreach Newsletter. The contents *of The Way* pose no threat to safety, security, or order within the Orient Correctional Institution.

13. Copies of *The Way* and various other Church publications have been mailed into Ohio prisons, including Orient Correctional Institution.

14. Certain of the publications have been rejected by the Orient and other Ohio institutions. Sometimes, some inmates are permitted to receive copies of *The Way* at a given institution while other inmates are barred from receiving them. On occasion, an inmate is prohibited from receiving a copy of *The Way* from the Church's Idaho headquarters, but the same inmate is permitted to receive the identical text from other sources.

15. The defendants *have* seized copies of *The Way* – which were mailed to Mr. Gerhardt at his request – by the Church. Among the copies of *The Way* that have been seized and withheld from Mr. Gerhardt are Issues numbered 9, 25, 26, 27, 28, 29, 30, and 31. These issues will being deposited separately with the Court. It is believed that other issues and publications have also been seized and withheld.

16. Materials of other religious groups with scripturally-based belief in the separation of races have not been barred from Orient.

17. In the past, Mr. Gerhardt has sought to have Christian Identity religious services conducted within Orient Correctional Institution for his benefit and for the benefit of co-religionists therein. These efforts have been refused, but he is in the process of renewing such efforts under new regulations promulgated by the Department of Rehabilitation and Correction.

18. During his entire incarceration, Mr. Gerhardt's behavior has been exemplary; nonetheless, he has been deprived of certain liberty and property interests, which deprivations are unrelated to the reasons for, or legitimate institutional interests surrounding, his incarceration.

19. As a result of his attempts to receive the religious materials and to hold religious services, on two occasions Mr. Gerhardt has been retaliated against by being charged falsely with, and punished for, purported rules infractions within the institution.

20. On one occasion, from early April until late May 1995, defendant Taylor, and those acting in concert with him, caused Mr. Gerhardt to be placed in "the hole" for forty-nine days. The alleged infraction was subsequently overturned by Reginald Wilkinson, Director of the Department of Rehabilitation and Correction, three months after Mr. Gerhardt had served his punishment.

21. On another occasion, in January 1996, defendant Coleman, and those acting in concert with her, caused Mr. Gerhardt to be placed in "the hole" for twenty-six days. The alleged infraction was subsequently overturned

within the Orient administrative process, but, even then, the defendants did not cause Mr. Gerhardt timely to be released from his punishment.

22. In addition, because of his efforts to receive religious literature and the right to have Christian Identity services, Mr. Gerhardt has been retaliated against by discrimination against him in the parole process.

23. In March 1996, Mr. Gerhardt was authorized to be released on parole. However, he was held from release, and in May 1996 his parole was withdrawn. The defendants, and those acting in concert with them, caused this reversal as retaliation for his efforts to exercise his constitutional rights.

24. Until April 1997 the defendants maintained racially-segregated lists of inmates for eligibility for merit status; the list was maintained for preferred job assignments and other privileges.

25. Because of the segregated lists, Mr. Gerhardt was prevented from early advancement to merit status.

26. The conduct of the defendants has been intentional, arbitrary and capricious, and with deliberate indifference to the rights of Mr. Gerhardt.

Count I

27. The withholding of religious literature from Mr. Gerhardt infringes upon (a) his rights secured under the Free Exercise Clause of the First Amendment, made applicable through the Fourteenth Amendment, to the Constitution of the United States, and under the comparable provisions of the Constitution of Ohio, (b) his right

not to have his religious mail and religious books subjected to unreasonable seizure in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States and the comparable provisions of the Constitution of Ohio, (c) his right to due process of law guaranteed under the Fifth and Fourteenth Amendments of the Constitution of the United States and the comparable provisions of the Constitution of Ohio, (d) his right to the equal protection of the laws guaranteed under the Fifth and Fourteenth Amendments to the Constitution to the United States and the comparable provisions of the Constitution of Ohio, and (e) rights secured under 42 U.S.C. §1983. Moreover, this conduct of the defendants (f) places the state in the position of granting favor to some faiths at the expense of others, in violation of the Establishment Clause of the First Amendment, made applicable through the Fourteenth Amendment, to the Constitution of the United States and comparable provisions of the Constitution of Ohio.

Count II

28. The denial of religious services to Mr. Gerhardt infringes upon (a) his rights secured under the Free Exercise Clause of the First Amendment, made applicable through the Fourteenth Amendment, to the Constitution of the United States, and under the comparable provisions of the Constitution of Ohio, (b) his right to due process of law guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States and the comparable provisions of the Constitution of Ohio, (c) his right to the equal protection of the laws guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States and the comparable provisions of the

Constitution of Ohio, and (d) rights secured under 42 U.S.C. §1983. In addition, the conduct of the defendants (e) places the state in the position of granting formal recognition and privileges to some faiths and denying the same to others, in violation of the Establishment Clause of the First Amendment, made applicable through the Fourteenth Amendment, to the Constitution of the United States, and under the comparable provisions of the Constitution of Ohio.

Count III

29. The punishments meted out to Mr. Gerhardt by placing him in "the hole" and by rescinding his parole constitute retaliation for the assertion of constitutionally protected rights and infringe upon (a) his rights secured under the Free Exercise and the Petition and Redress Clauses of the First Amendment, made applicable through the Fourteenth Amendment, to the Constitution of the United States, and under the comparable provisions of the Constitution of Ohio, (b) his right to due process of law guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States and the comparable provisions of the Constitution of Ohio, (c) his right to the equal protection of the laws guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States and the comparable provisions of the Constitution of Ohio, (d) his right not to be subjected to cruel and unusual punishments in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and the comparable provisions of the Constitution of Ohio, and (d) rights secured under 42 U.S.C. §1983.

Count IV

30. The racial classification scheme previously employed in the merit system for assignment to jobs and other privileges violated Mr. Gerhardt's (a) right to the equal protection of the laws guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States and the comparable provisions of the Constitution of Ohio, (b) right to due process of law guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States and the comparable provisions of the Constitution of Ohio, and (c) rights secured under 42 U.S.C. §1983.

Request for Relief

For each of the foregoing reasons, and for all of them, Mr. Gerhardt requests the Court:

(a) to issue a declaratory judgment that (1) the defendants' withholding of Christian Identity religious materials, (2) their refusal to permit Christian Identity services, (3) their enumerated acts of retaliation, and (4) the racial classification scheme employed in the merit system have violated rights secured to Mr. Gerhardt under the Constitution and laws of the United States and the State of Ohio;

(b) to issue preliminary and permanent injunctions directing the defendants (1) to permit Mr. Gerhardt to receive Christian Identity Church literature, (2) to permit, and allow Mr. Gerhardt to participate in, Christian Identity services at the Orient Correctional Institution, and (3) to undo the effects of

prior acts of retaliation and refrain from any future retaliation against Mr. Gerhardt;

(c) to award Mr. Gerhardt compensatory damages jointly and severally against the defendants in their personal capacities in an amount proved at trial to compensate him for injury to his liberty and property interests;

(d) to award Mr. Gerhardt his costs and his attorneys' fees as provided in 42 U.S.C. §1988; and

(e) to award Mr. Gerhardt such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Benson A. Wolman

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Attorneys for Plaintiff
John W. Gerhardt

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN W. GERHARDT, Plaintiff,	:	CASE NO. C2-95-517
-vs-	:	
ALAN LAZAROFF et al., Defendant.	:	MAGISTRATE JUDGE KEMP

UNOPPOSED SUPPLEMENT TO THIRD AMENDED COMPLAINT

(Filed Oct. 19, 2000)

Paragraphs 3 (Jurisdiction), 27 (Count I), 28 (Count II), and 29 (Count III) of the Third Amended Complaint are amended to add the Religious Land Use and Institutionalized Persons Act of 2000, signed into law on September 29, 2000.

Paragraph 6 is amended to *add* the new warden as follows: "Defendant Robert Beitler is the Warden of Orient Correctional Institution, which is operated by the Department of Rehabilitation and Correction of the State of Ohio. His principal place of business is in Pickaway County, Ohio. At all relevant times, he has acted under color of state law. Defendant Beitler is sued in his individual and official capacities with regard to the declaratory and injunctive relief sought, and in his individual capacity with regard to the claims for damages."

Paragraph 29 is amended to delete "and by rescinding his parole" from the first sentence thereof.

Counsel for the defendants has authorized the undersigned to represent to the Court that he does not oppose this Supplement.

Respectfully submitted,

/s/ [Illegible]

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Attorneys for Plaintiff
John W. Gerhardt

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

– – –

Steve Syder, et al., Plaintiffs, -vs- Governor George V. Voinovich, Et al., Defendants.	:	No. C2-94-536

– – –

JUNE 19, 1996

EXCERPTS FROM THE
DEPOSITION OF
MATTHEW R. MEYER

A Defendant herein, called by the Plaintiff for cross-examination under the applicable Rules of Ohio Civil Court Procedure, taken before me, Michael A. Caswell, Professional Reporter and Notary Public in and for the State of Ohio, pursuant to Notice, at the Offices of Bricker & Eckler, 100 South Third Street, Columbus, Ohio 43215, on Wednesday, June 19, 1996, commencing at 9:10 a.m.

– – –

APPEARANCES:

SARAH J. DeBRUIN, Attorney at Law
Bricker & Eckler
100 South Third Street
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On behalf of the Plaintiffs.

JEFFREY POTH, Esquire
Ohio Attorney General Criminal Justice
140 East Town Street, 9th Floor
Columbus, Ohio 43215 (614) 644-7233,

On behalf of the Defendants.

ALSO PRESENT: Jeannette Butterworth

* * *

[78, 79] different than a gang?

A. The ones that I've been affiliated with are structured differently.

Q. Have you been affiliated with occult groups?

A. No. The ones that I've been aware of that I have been a part of investigating or doing research on have been different.

Q. How so?

A. The street gangs that I've been a part of investigating usually have several different ranks of hierarchies. The occult groups usually will have one individual, usually a charismatic leader, as a part of their group. They might have some other ranks, but not usually as deep, per se, as many levels as the street gangs have.

Q. Is it fair to say that street gangs are really organized to engage in criminal activities whereas an occult group might be organized for other purposes, I mean to carry out a cause and not necessarily designed to commit crimes? Is that fair or not?

A. Yes and no. It's really changing with the street gangs. A lot of street gangs are creating or – protections that a religious affiliation provides them under the freedom of religion act. And two, if you'll look back at how a lot of groups started, you'll see that if you can make a belief system as a part of your cause, it really strengthens the beliefs of those individuals within your group.

I would use the example of Saddam Hussein during the Gulf War saying that the United States was coming to take away their rights of them to worship Allah, and that was their rallying cry. And when he gave that, that was what brought everybody together. A lot of those charismatic gang members or leaders on the street realize, you know, that to bring a belief system makes their group even stronger.

Q. So that's a phenomenon you're seeing in street gangs today?

A. As well as in the institutions and the security threat groups.

Q. Okay. At the University of Dayton, how many courses did you have in sociology?

A. Maybe three.

Q. Did any of those courses focus on gangs or

* * *

[106, 107] Q. And in fact, the department has a rather comprehensive Muslim religious program, doesn't it?

A. Yes, it does.

Q. And in fact, that program permits Muslims on one occasion to have separate meals and separate celebrations twice a day for a period of one month during the feast of Ramadan; is that correct?

A. I believe it is.

Q. Do you believe those celebrations and those separate feasts are opportunities for security threat groups to organize?

A. Yes, I do. I think – Let me explain that. I think that in an institution you have to be very careful about granting – you have to be very conscientious of perception from other inmates and very conscientious of privileges that you grant to one group and the perception of how another group is going to perceive that at the institution. You have to be very careful in how you implement those things because it opens, you know – Since the freedom of religion act, it's opened a lot of doors for other groups to come in and claim they're participating with some or we've had individuals that have literally picked the encyclopedia of religions and picked the religion out they want to be affiliated so that they can get certain rights affiliated with that religion even though the religion hasn't existed for several hundred years.

Q. I understand that's a problem and I understand the department considers the Religious Freedoms Restoration Act to open the door to some of those problems. What I'm curious about though is here we have a documented

case of a group of Muslims who started a riot, killed people, a lot of people, have been prosecuted for it, and yet the department allows and goes out of its way to make special allowances for these individuals to still meet separately and conduct their religious practices. You've testified that you think that's a security threat; is that correct? Or it's an opportunity for security threat group activities to go on; is that right?

A. If not properly managed, yes.

Q. But it's an opportunity and potential; is that right?

A. Yes.

* * *

[188, 189] as new groups.

Q. Specifically, what new groups did you talk about, if you can recall?

A. I spoke about new groups that we – some of the groups that we have that are changing, involving some of the – I talked about the Hanafi group and the fact that that group as well as some of the other groups that we're seeing in the institution are using some of the religious aspects as covers for their group. I also spoke about the Aryan Brotherhood and their increase in activity in our system and department and the activity that they're having on the street as well.

Q. Now, other than the Hanafi group that use their religion as a cover, what other groups have done that?

A. There's a white supremacist group that has used several churches as a cover for their white supremacist activity. And they say they're not a threat, but rather a church organization. However, their actions have shown otherwise.

Q. And this you've seen in the department

A. Yes, I have.

Q. Give me some examples of that.

A. Well, there's a case currently involving the Aryan Nations who are trying to say that Aryan Nation propaganda that is sent to inmates and Aryan Nation activity in the institution is protected under the freedom of religion act.

Q. Any other examples of security threat groups using religions or attempting to get protection from the Religious Freedom Restoration Act that you're aware of?

A. That's the only one I can think of right now.

Q. You can't think of any others?

A. Besides the Hanafi group and this group, Aryan Nation, that's happened at more than one institution. That's all I can think of right now.

Q. To your knowledge, have the Native American groups in the different institutions ever used their group time or their opportunity to meet as an opportunity to further any kind of security threat group activities?

A. Not that I'm aware of.

Q. To your knowledge, have any inmates who

* * *

CERTIFICATE

– – –

THE STATE OF OHIO:

SS:

COUNTY OF FRANKLIN:

I, Michael A. Caswell, a Professional Reporter and Notary Public in and for the State of Ohio, do hereby certify that before the taking of this said deposition, the said MATTHEW R. MEYER was first duly sworn by me to tell the truth, the whole truth and nothing but the truth;

That said deposition was taken in all respects pursuant to the stipulations of counsel heretofore set forth; that the foregoing is the deposition given at the said time and place by the said MATTHEW R. MEYER;

That I am not an attorney for or relative of either party and have no interest whatsoever in the event of this litigation.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of office at Columbus, Ohio, this 1st day of July, 1996.

My Commission expires
June 28, 1999

/s/ Michael A. Caswell
MICHAEL A. CASWELL
Notary Public
In and for the State Of Ohio

– – –

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN MILLER, et al.,
Plaintiffs,
vs.
REGINALD WILKINSON, et al.,
Defendants.

Civil Action No.
C2-98-275

DEPOSITION
of **MATTHEW MEYER**

Taken at the offices of
Ohio State University
College of Law
55 West 12th Avenue
Columbus, Ohio 43210
on February 18, 2000, at 9:32 a.m. and
on March 17, 2000, at 9:18 a.m.

Reported by: Angela R. Starbuck, RPR

-=0=-

[36] MR. MARTI: Objection. Go ahead and answer.

A. If I understand your question correctly, can two Iron Horsemen members attend a Catholic service together?

Q. In the same prison.

A. Yes.

Q. Okay. I'd like you to turn to the first – I think it's Exhibit 25.

A. Yes.

Q. Okay. Is the date on top of this document – that's the date it was printed out; is that right?

A. That's correct.

Q. Okay. Just checking.

So nowhere on this – this document does it show the date that the document was made; is that correct?

A. That's correct. It's – it's in the computer, but it doesn't print out on this – it won't print out on this form.

Q. Okay. Could you read the name of the inmate.

A. [Putative Class Member #1]

[37] Q. Could you read the label at the top of the page.

A. STG inmate information.

Q. Okay. Do you know who prepared this specific document?

A. I believe I printed it out.

Q. No, I mean, who – who prepared the contents?

A. I – I can't tell you looking at this, no.

Q. Is there any way in the computer for you to tell me who gathered this information?

A. No, not without looking at the – not without looking at the profile.

Q. But I can tell by – I can tell by look at the profile who prepared this document?

A. There has to be a signature on it, yes.

Q. Okay. That's fine. What facility is [Putative Class Member #1] located in?

A. Shows him at being at Belmont Correctional Institution.

[38] Q. Okay. What's the STG code related to this inmate?

A. Aryan Reich.

Q. Is there a list of STG codes somewhere?

A. Yes.

MS. CONN: Could we get that document?

MR. MARTI: Would that be a problem?

THE WITNESS: No.

MR. MARTI: Okay.

BY MS. CONN:

Q. Are the STG codes uniform throughout the State of Ohio, or does each prison have a separate list?

A. No, we generate that.

Q. They're uniform throughout the state?

A. Yes.

MR. MARTI: Let me just interject, probably all the documents that we produced pursuant to your request will be under the confidentiality agreement. I just want to backtrack and make sure that list is under

* * *

[40] the information that's filling out the profile. Then it's checked by – by the investigator, then it's checked a third time by – by Phil and my office to see, one, whether it's – it's a group that had ever been identified previously. You know, a lot – a lot of them are street – street groups, et cetera; and, two, whether there's any other information to substantiate that.

Q. Now, we said in document 25 that [Putative Class Member #1] was – his STG code was Aryan Reich; is that –

A. Correct.

Q. Is there any information that relates that STG to Asatru, the religion, to your knowledge?

A. Not – not to my knowledge.

MR. MARTI: The reason this man's file was produced is because he was identified as a Plaintiff class member. I think that is probably your connection right there.

MS. CONN: Right.

BY MS. CONN:

[41] Q. So to the best of your knowledge, the Aryan Reich is not related to Asatru?

A. I – I can't really say. If you read on the notes section, he was actually corresponding with an inmate in Texas who is trying to get him involved with the Aryan Reich to then recruit people in Ohio.

Q. Right.

A. So I'm not totally familiar with the Aryan Reich.

Q. So that's – but how does that relate – what I'm asking is, to your knowledge, is the Aryan Reich related to Asatru?

A. I – I don't know.

Q. Okay. What is [Putative Class Member #1's] rank?

A. Doesn't list any rank.

Q. Could you explain what rank is and how you determine what someone's rank is.

A. Rank is – is what position they hold in an organization, determined either by their self-admission, by information that was confiscated, intercepted, or information that was gathered from a confidential

* * *

[44] list those which are believed to be significant to their STG affiliation.

Q. And how do you know about their tattoos?

A. By – by looking at them.

Q. And do you ask each inmate when they got each tattoo?

A. No. I mean, a lot of these guys are – are sleeved out. I mean, they're covered with tattoos. It would take you hours.

Q. What are [Putative Class Member #1's] tattoos?

A. It shows a tattoo description as being dagger, swastika, a war shield, and lightning bolts.

Q. Do any of those have any particular meaning, to your knowledge?

A. Yes, they do.

Q. What?

A. Well, the swastika is typically a tattoo worn by white supremacists. In the prison it is a common sign identified by – by all inmates as a white supremacy symbol from – from the times of Nazi Germany.

[45] The lightning bolts, as well, is identified as a – as a typical white supremacist symbol representing Hitler's SS troops.

Q. Okay. What about the other two?

A. The war shield, without looking at the tattoo, exactly, it's difficult for me to say what exactly the war shield is. A war shield, it could be an Aryan Nation's shield, it could be a Viking shield.

Q. Okay. What about the dagger?

A. The dagger, I – I don't know without looking at the tattoo.

Q. What about the lightning bolts?

A. The lightning bolts are the ones that typically represent the SS – or Hitler's SS troops.

Q. Oh, okay. And where are [Putative Class Member #1's] tattoos located?

A. It only shows the tattoos being located on the right arm, and that may – they might not be totally accurate, because we can only enter one tattoo location.

Q. Oh, okay. Could you read the [46] paragraph under the notes section.

A. Paragraph says, "Received information from [redacted] 532-040, from Tennessee -- Tennessee Colony, Texas, regarding the creation of a United Aryan Front. [Putative Class Member #1] was asked to represent that troop in Ohio.

"The front consists of a racial education of members that lasts six months, and the goal of establishing a community of 500 to a thousand acres of land, which would include indoctrination facilities."

Q. I'm assuming this was taken from a letter?

A. I believe so.

Q. Is [redacted] aware that he's mentioned in this file?

A. I'm not aware. I –

Q. To you knowledge.

A. I don't know. I believe we spoke with the STG coordinator in Texas, but I can't – I can't tell you exactly.

Q. To your knowledge, is [Putative Class Member #1] aware that this STG information sheet [47] exists?

A. If I remember correctly, I've – I've talked to him at some point. I don't know that I've interviewed him, but I – I think that even I've talked with him. I know that – if

I remember right, we had a couple conversations about this letter, because it was a relatively new group.

Q. So when you spoke with him and talked to him about the letter, was he made aware that this information sheet exists?

A. No, I don't – I don't believe so.

Q. Okay. Let's move to 26. Could you read the inmate's name.

A. Inmate name, [Putative Class Member #2]

Q. Okay. Could you read the prison location.

A. Ross Correctional Institution.

Q. What STG code is associated with [Putative Class Member #2]

A. White supremacist.

Q. Is this related to Asatru, to your knowledge?

A. This sheet?

* * *

[52] the street.

Q. You said that could encompass more than one organization. What are some – some different organizations that are encompassed within the white supremacist code?

A. They could be – it could have been Klan members or Klan associates, the Aryan Nation, Skinheads.

Q. Okay. What is [Putative Class Member #2's] rank?

A. They list him as a member.

Q. What is [Putative Class Member #2's] nickname?

A. [redacted]

Q. And I would ask for each question, but I'm just going to assume that if I were to ask how do you know each of these things, you're going to give me the same answer as – as the same reasons you knew for [Putative Class Member #1]. If there's anything different, could you interject that?

A. Sure.

Q. Okay. What is his level of participation?

A. Level 1.

[53] Q. And could you tell me again what Level 1 is.

A. Passive participation.

Q. Could you tell me what his level of identifiers are.

A. His level of identifiers are PA and PC.

Q. Could you list his associates.

A. We have no associates listed.

Q. Okay. So if there are no associates listed, does that mean you do not have knowledge of any other white supremacists in the same institution?

A. No.

Q. Okay. Why would there be no associates listed?

A. We weren't – we didn't identify any associates, whether it was because we – they weren't aware of them

when they filled out the profile, or didn't have that information.

Q. Okay. Could you list [Putative Class Member #2's] tattoo description.

A. Describes his tattoos as swastikas [54] and lightning bolts on both arms.

Q. And I believe those were both tattoos that we've already discussed the meaning of in Exhibit 25?

A. That's correct.

Q. Okay. Could you list the location of the tattoos.

A. It lists the location as right arm.

Q. Is there any significance in the location of the tattoos?

A. Not – not normally with these groups.

Q. Okay. When would it be significant?

A. With some of the street gangs it's significant in terms of which side they represent.

Q. Okay. If it comes up in this, would you point it out –

A. Point out the significance?

Q. Yes.

A. Yes.

Q. There's nothing under the notes section. Who decides if notes go in?

A. Phil Vermillion decides.

* * *

[57] beliefs, a great deal of overlap in their organizational membership, that it's not uncommon for an inmate to have membership association with multiple groups.

Q. Okay. To your knowledge, is [Putative Class Member #2] aware that this information sheet exists on him?

A. I don't know.

Q. Okay. Let's turn to No. 27, Exhibit 27. Could you read the name – the inmate's name.

A. Yes, [Putative Class Member #3].

Q. And where is he located?

A. Ross Correctional Institution.

MR. MARTI: For the record, I think [Putative Class Member #3] has been transferred since that form was generated.

MS. CONN: He's at Warren?

MR. MARTI: I believe so.

BY MS. CONN:

Q. Could you read the security threat group code related to [Putative Class Member #3].

A. Yes, Outlaws MC.

Q. To your knowledge, is that group, [58] related to Asatru?

MR. MARTI: Objection. Go ahead and answer.

A. I'm not aware of any direct tie with the Outlaws to Asatru.

Q. Could you list his rank.

A. Associate.

Q. Could you list his nickname.

A. [redacted]

Q. Could you list his level of participation.

A. Level – Level 1.

Q. Could you explain what associate means.

A. Associate –

Q. I'm sorry, let me clarify that.

His rank is associate. Could you clarify what that means.

A. That – as far as – as far as this goes, he may not – we don't have him identified necessarily as a full-fledged member.

Q. Okay. Could you list his level of identifiers.

[59] A. Yes, PA, PC, AB.

Q. So you have PC, he's self-proclaimed as affiliated with the Outlaws?

A. Correct.

Q. Could you list his tattoo descriptions.

A. 714, comma, spider, slash, left thumb and forefinger, comma, many others.

Q. Could you explain the significance of the tattoos described.

A. I'm not exactly sure on 714. I believe it's a reference to drugs. That's a common tattoo among One Percent Outlaw Bikers. The other ones I don't know how to describe.

Q. You don't know the significance of the others?

A. No, I don't.

Q. Okay. Could you read the location of the tattoos.

A. Tattoo location says left arm.

Q. Could you read the paragraph below notes.

A. Notes, associations, raised by [60] Outlaws, parentheses, Dayton, brother-in-law, [redacted], quotations, ABU, retired from Fugeros, cousin to [redacted], quotations, [redacted] All ranks held. Was president when killed. Was raised by [redacted]

Q. To your knowledge, is [Putative Class Member #3] aware that this information sheet was prepared?

A. Yes, primarily because that information was – if I remember correctly, was gathered from his own self-admission.

Q. But did he know when you gathered this information that it was for a security threat group information file?

MR. MARTI: Objection. Go ahead and answer if you know.

A. I'm not certain whether he was told or not.

Q. Okay. Let's go to No. 28. Could you read the inmate's name.

A. [Putative Class Member #4]

Q. Could you list his location.

A. Ohio State Penitentiary.

[61] Q. Could you list his STG code.

A. White supremacist.

Q. Could you list his rank.

A. Leader, question mark.

Q. Leader, question mark. Does that mean you don't know if he's the leader?

A. That's correct. There's suspicion to believe that he may be, but not necessarily confirmed.

Q. So there's no tangible evidence that he's the leader?

A. I – I can't tell you what evidence exactly.

Q. Could you list his nickname.

A. [redacted]

Q. Could you list his level of participation.

A. Level 3, disruptive.

Q. Could you list his level of identifiers.

A. AA, AB, AD, D1, D2, D3, D4.

Q. Could you list his associates.

A. Other heavy whites only.

Q. Could you explain what that means.

[62] A. Typically we put that down if he – he would be the type of individual that will only associate with individuals who are heavily involved with the white supremacists or Aryan Brotherhood.

Q. Could you list his tattoo description and location.

A. There are no tattoo descriptions, nor locations listed.

Q. Do you know why he received Level 3 participation?

A. Yes I do.

Q. Could you tell me.

A. He received it for sure – for one reason, from the fact that he killed Officer Davis in '92 at Mansfield.

Q. And could you tell me again what Level 3 meant.

A. Disruptive.

Q. Could you read the paragraph below notes.

A. Yes. It says inmate killed CO Davis in '92 at Mansfield. Incident believed to be Aryan Brotherhood related.

[63] Q. What was the ethnicity of Officer Davis?

A. He was black.

Q. To your knowledge, does inmate Slider know that this sheet exists on him?

MR. MARTI: Objection. Go ahead and answer if you know.

A. I'm not aware.

Q. Okay. Let's go to Exhibit 29. Could you read the inmate's name.

A. [Putative Class Member #5]

Q. And he's located where?

A. Ross Correctional Institution.

Q. Could you list the security threat group that he's associated with.

A. Iron Horsemen.

Q. To your knowledge, are the Iron Horsemen in any way related to Asatru?

MR. MARTI: Objection. Go ahead and answer if you know.

A. I'm not aware of any direct –

Q. What is his rank?

A. Vice-president.

Q. What is his nickname?

[64] A. There's no nickname listed.

Q. Level of participation?

A. Level 1, passive.

Q. Level of identifiers?

A. PA, PC.

Q. Could you list his tattoo description.

A. Large Iron Horseman tattoo across back, Iron Horse – Horseman, I think.

Q. Is there any significance to those tattoos?

A. Yes.

Q. Could you explain how.

A. Well, you don't put an Iron Horseman tattoo on your back unless you're an Iron Horseman.

Q. Can you tell me the location of the tattoos.

A. Back.

Q. Is there any significance to the location?

A. Bikers typically will put their tattoo, et cetera, across their back.

Q. So is the Iron Horsemen a biker – a [65] biker security threat group, biker gang?

A. It's a one percent biker – outlaw biker group.

Q. A what?

A. A One Percent.

Q. What does that mean?

A. One Percent is just how they identify themselves from the rest of the bikers.

Q. Okay. Could you read the paragraph below notes.

A. Notes, inmate stated he was the vice-president of Northern Kentucky Chapter of Iron Horsemen.

Q. Okay. Let's move to Exhibit 30. Could you read the inmate's name.

A. [Putative Class Member #6]

Q. Could you read the location.

A. Lebanon Correctional Institution.

Q. Could you tell us what security threat group he's associated with.

A. Odin Brotherhood.

Q. To your knowledge, is that related to Asatru?

[66] MR. MARTI: Objection. Go ahead answer.

A. I would tend to believe it is.

Q. To your knowledge, do you have – what are you basing that opinion on?

A. On – the first name of the group being Odin in reference to – to the Odinists.

Q. Is that the only thing you're basing your opinion on?

A. By looking at the sheet, I'm not – I don't know if the – of any other information about him other than what I'm looking at.

Q. Well, I'm not talking about [Putative Class Member #6] I'm talking about the Odin Brotherhood.

A. I don't know a great deal about the group.

Q. Okay. What is his rank?

A. Inner circle.

Q. What does that mean?

A. I don't know.

Q. What is his nickname?

[67] A. [redacted]

Q. What's his level of participation?

A. Level 1.

Q. Level of identifiers?

A. PA, PC.

Q. Who are his associates?

A. Associates list KKK, Confederate Knights of Kentucky, Aryan Brotherhood.

Q. What are his tattoo descriptions?

A. Description is Klansman, comma, chest; swastikas.

Q. Location?

A. States back.

Q. On this form, can you list more than one security threat group code – I know before you said you could only list one location of the tattoo. Can you list more than one STG code?

A. There's only one code that's listed for this inmate.

Q. Right. That's not what I'm asking.

Are you able to, in the computer, list more than one code?

A. No.

* * *

[69] Q. Could you read the name of the inmate.

A. [Putative Class Member #7]

Q. Could you list his location.

A. Ohio State Penitentiary.

Q. List his STG code.

A. White supremacist.

Q. His rank?

A. No rank listed.

Q. His nickname?

A. No nickname listed.

Q. Level of participation?

A. Level 3.

Q. Level of identifiers?

A. PA, PB, AA, AH, D1, D2.

Q. Associates?

A. [redacted]

Q. Tattoo description?

A. 100 Percent Raw Power. Right arm, Vikings.

Q. The significance of those tattoos?

A. The – I'm not sure about the 100 Percent Raw Power, and I can't tell from [70] this whether there's anything else with that, but the right arm with the Vikings – Vikings a lot of times are used by the white supremacists as a popular tattoo for them.

Q. Do you know why [Putative Class Member #7] has a Level 3 participation?

A. In his particular case, he was involved in a stabbing over this past summer.

Q. Did the stabbing – could you elaborate on the stabbing, the motivation behind the stabbing.

A. We believe it to be a power fight within the Aryon brotherhood at Lebanon this summer, as a result of the leader of the Aryan Brotherhood stabbing a – an inmate – a black inmate in the chow hall. Then [Putative Class Member #7] was involved later, I believe that week, with another inmate that we believe to be a power fight with the Aryan Brotherhood.

Q. Okay. Could you – could I just note that the tattoo location is on his chest. I don't remember if I asked that question.

[71] But under notes, could you read the paragraph under notes.

A. States, inmate also had various white supreme – or WHISU, just an abbreviation for white supremacist – books and property, would consider as AB associate.

Q. What's AB?

A. Aryan Brotherhood.

Q. Let's move on to No. 32. Could you list the inmate's name.

A. [Putative Class Member #8].

Q. And where he's located?

A. Warren Correctional Institution.

Q. Could you list his STG code.

A. Aryan Nations.

Q. To your knowledge, is the Aryan Nations related to Asatru?

MR. MARTI: Objection. Go ahead and answer.

A. Not – not that I'm aware of.

Q. I'm sorry?

A. Not that I'm aware of.

Q. Okay. Could you tell me [72] [Putative Class Member #8's] rank.

A. No rank listed.

Q. Could you tell me his nickname.

A. [redacted]

Q. Level of participation?

A. Level 1.

Q. Level of identifiers?

A. PA, PC.

Q. Associates?

A. [redacted]

Q. Tattoo descriptions?

A. Lightning bolts.

Q. Tattoo location?

A. Left wrist.

Q. I'd like to note there are no notes.

Could we go to No. 33. Could you please tell me the inmate that this form is in regards to.

A. [Putative Class Member #9].

Q. Could you tell me what this inmate – why he was in front of the Rules Infraction Board.

A. The ticket states, on the above [73] stated date and time it was discovered that [Putative Class Member #9] had drawn a Thor's hammer with signs of various white supremacist groups drawn in concert with the Thor's hammer. It was a direct violation of Administrative Code 5120-9-06, Section E-31, Paragraph C.

[Putative Class Member #9] is a self-admitted white supremacist and was advised by me that this type of behavior would not be tolerated.

Q. Okay. It says he's guilty of CII-31(E). Could you tell me exactly what that is.

A. That's Class II, 31 of 5120-9-06.

Q. Which is?

A. The Administrative Rule listing inmate – the code of conduct or rule violations, I guess, more specifically.

Q. What rule, specifically, did he violate?

A. Rule 31.

Q. Right. What does Rule 31 say?

MR. MARTI: Objection. Go ahead and [74] answer if you know.

A. Rule 31 says no inmate shall – basically no unauthorized group activity, as set forth by AR 5120-9-37, Paragraph B.

MR. MARTI: These ARs, or Administrative Regulations, are part of Ohio law, and if you're going to ask him questions about that, I'd ask that he be given a copy of that. I'm sure you have it in your law library. Is that – if you want to ask more questions, I'd ask that we do that.

MS. CONN: No.

BY MS. CONN:

Q. To your knowledge, is there an inmate information sheet on [Putative Class Members #9]?

A. I'm not aware. I don't know.

There's 46,500 inmates in our Department. I don't know whether we have a sheet on him or not. I would assume that we do.

MR. MARTI: We'll check. The reasons we didn't pull [Putative Class Member #9's] sheet is because he wasn't identified as a class [75] member. Do you want [Putative Class Member #9]?

MR. BRYSON: If we can go off the record.

(Discussion off the record.)

BY MS. CONN:

Q. We were discussing Exhibit 33. Why is this document something that would pertain to Asatru?

A. Because it had a known Asatru symbol up with the swastika, being a known white supremacist symbol.

Q. Okay. So the Thor's hammer was the Asatru symbol, and the swastika was the gang symbol?

A. Yes.

Q. Do you know what the symbol represents? Not the swastika, the Thor's hammer.

A. I – I know it – I guess a bit of history, that it – it was a Viking symbol of some sort.

Q. Okay. Who has access to the information in these STG inmate information files in the computer?

* * *

[82] threaten the safety of correctional facilities.

I guess, have you ever been present when an incident has occurred that has threatened the safety of inmates or correctional staff?

MR. MARTI: I don't mean to be difficult, but there are about four or five questions in there. Could you break them out and ask them individually.

MR. BRYSON: Sure.

BY MR. BRYSON:

Q. Let me put it this way: Could you please mention any personal experiences you have to support your conclusion in Paragraph 3 of your affidavit.

A. Well, I guess one of the – the biggest experiences I have is the Lucasville – SOCF riot on April 11th, 1993, wherein a group of inmates – actually three different security threat groups were involved in a riot which took the lives of, I believe, nine inmates and one staff member, cost the State roughly $63 million.

[83] Q. And were you present during that – the riot?

A. I worked out of actually our headquarters during the riot, and then I worked at Lucasville – I was assigned to the committee to Lucasville for approximately three or four months afterwards.

Q. You said there were three STGs involved in the incident?

A. That's correct.

Q. Could you please tell us what those STGs were.

A. The Aryan brotherhood, Gangster Disciples, and the group identified as Hanafi Ulam of South Africa.

Q. Is that the same group you mentioned in Paragraph 4 of the affidavit?

The last one, the Hanafi –

A. That's correct. That's correct.

Q. Now, to your knowledge, were any members of the Asatru or any followers of the Asatru faith involved in

the uprising at the Southern Ohio Correctional Facility that [84] you just mentioned?

MR. MARTI: Objection. Go ahead and answer.

A. I don't recall. There was – there were 700 inmates –

Q. Okay.

A. – in that block that day.

Q. Besides this incident at the Southern Ohio Correctional Facility, have there been any other incidents in Ohio prisons that you know of that have involved security threat groups, as far as – yeah, let me rephrase that. I understand –

MR. MARTI: We'll be here for quite a while.

BY MR. BRYSON:

Q. Could you please describe any other personal experience you have in Ohio prisons in which security threat groups have posed a significant threat to a correctional facility.

A. Yeah, I can. I'm not exactly sure where to start. I've investigated escapes at Lebanon that Elam and Michaels escaped [85] from Lebanon assisted by the Aryan Brotherhood. There was an escape, Saffell and Turner escaped from Madison Correctional. Turner, aided by the Aryan Brotherhood.

We had a murder at Madison that six inmates were charged, found guilty criminally for killing Damico Watkins, as an Aryan brotherhood hit –

Q. Suffice it to say, you have a lot of experience, then, dealing with STGs and specifically causing incidents at prisons?

A. Yes.

Q. And those are just a – several of the many experiences you've had?

A. Correct.

Q. So in your experience, have you ever run into an experience in which someone you knew who was a follower of Asatru was engaged in such activity?

A. Yes. We were talking about some of these individuals earlier during your questions. One in particular being – being [redacted]. In fact, following his – [86] following his assault and the death of Officer Davis, he was – he was involved with attempts to smuggle a zip gun into Lucasville prison, smuggling bullets into Lucasville prison.

Additionally, another individual that was identified as being – identifying himself as – as being a follower of Asatru was [Putative Class Member #7] who was involved in a stabbing this past summer at Lebanon.

Q. To your knowledge, were those followers of Asatru at the time these incidents occurred, or did they become followers of Asatru after the incidents?

MR. MARTI: Objection. Go ahead and answer.

A. [redacted], I think, it was somewhat at the same time. I don't know – I don't have information of him being involved with Asatru at the time that he stabbed Officer Davis.

Q. Okay.

A. But I do know of him being – identifying himself and, in fact, requesting

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[13] cells of groups that had been involved in the killing of Alan Berg in Denver, the Jewish talk show host, to the organized robberies of armored cars up in the Washington area, to the ties of Timothy McVeigh and his exploits, of course, the bombing of the Oklahoma City building, and the ties with him across the country as he made his travels around the – around the U.S.

Q Let me ask you about a couple of those things. The Alan Berg matter, what groups were involved with that?

A Well, I'm going – going back in the memory here.

Q Okay.

A It was – I'm trying to – the Bruder Schweigen, again, I believe, was the group involved, from my best recollection.

Q And who was involved with the bank robberies out in the northwest?

A That was a guy – the primary leader was a guy by the name of – I think Robert Matthews was the primary leader.

[14] Q Was that the Order organization?

A Yes.

Q Have you seen similar criminal activity here in Ohio from white supremacist groups?

A In fact, talking about the bank robberies, almost an exact replica of that was an incident that took place up in the northern part of Ohio involving two brothers and a couple of associates, brothers by the name of Luther that robbed several banks up in northern Ohio.

One of the brothers went through the Aryan Nation headquarters in Hayden Lake, and even today – we've got them now in our prison systems, and there's $30,000 which I believe has never been recovered in that incident.

Other incidents involving those white supremacist groups in Ohio, the Kehoe brothers involved in the shoot-out in Wilmington, Chevy and Shane Kehoe.

That incident happened to take place a day prior to the Aryan Nation and several

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[16] of the foremost white supremacist groups today, you know, in the United States. William Pierce being their leader, Cleveland being one of their key headquarters today. In fact, that's where he has based his record label out of, Cleveland Ohio.

Q I'm sorry, who's the fellow that's –

A William Pierce.

Q Is he the fellow that wrote the Turner Diaries?

A Yes, he is. He also wrote a book called The Hunter.

Q How does Ohio rank in terms of prevalence of white supremacists? How does it compare to activity in other states?

A It's – by most accounts, it's one of the – the lead states in the United Stats in white supremacist activity.

Q Okay.

A Not – not only being ranked by myself in looking at and talking to other states, but as such by the – by the Southern Poverty Law Center, and some other [17] organizations.

Q Who is – what is the Southern Poverty Law Center?

A The Southern Poverty Law Center is a group that was started by – by Morris Dees. They're a group that basically started keeping track of different supremacy groups, whether they be white supremacy or black supremacy, or other groups that exist around the country. And they keep – keep a great deal of information and intelligence on those groups across the U.S.

Q How do law enforcement officials view the quality of their work?

A They're perceived as being very accurate.

Q Now, you mentioned a number of Different groups; Aryan Nation, Aryan Brotherhood, the Order, the National Alliance. Could you describe how these groups interact, if at all.

A There's a lot of interaction between the groups. If you go back into the history of some of the groups and you look at, you

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[27] they want to cell with their own gang, so they used that to manipulate the system to benefit their organization. And, you know, we've seen the Christian Identities – it's been around, but I've been there eight years and started seeing it then.

What's happened, though, is we've Seen it kind of change. You know, as we become more – more aware – when it started, when there was no training going on about, you know, the Christian Identity movement or the use of Christian Identity by the gangs, et cetera.

As we've trained on those things, they've changed their – you know, their agenda and changed. They go about, you know, circumventing the system, and that's where we've seen in the last several years the change to the Asatru in order to show their group within the prison.

Q Okay. Who's David Lane?

A David Lane an individual that is in federal prison. He is an individual that, through his contacts on the street today, [28] runs the 14 Word Press, which is a web site and also a publication.

David Lane, I can't tell you exactly what his crime was, but he was involved in a series of racially motivated crimes on the street.

Q Could you describe what background he had in Christian Identity.

A It's my understanding prior to him Coming into prison, he was involved with the Christian Identity movement and several different organizations, like similar to similar to Timothy McVeigh, and those – it cut across

several different groups, depending on who would support them or who would hide them out, et cetera, and was involved in that prior to – to going into Federal prison.

Q Do you know, has his religious – Espoused religious beliefs changed over time.

A Today he's – today he's one of the individuals that they see as being one of the more leading figures in the Asatru [29] movement.

Q Okay.

MR. MARTI: Off the record.

(Pause in proceedings.)

(Deposition Exhibit 37 marked.)

BY MR. MARTI:

Q Mr. Meyer, I'm handing you what's been marked as Deposition Exhibit 37. Could you identify that, please.

A Yeah, I believe it's a picture of David Lane.

Q Okay. The thing he's wearing around his neck, what is that?

A That's the Thor's hammer.

MR. MARTI: I should have marked these while we were off. Could you do those.

(Deposition Exhibits 38 and 39 marked.)

MR. MARTI: It's 1291 through –

MR. BRYSON: Yeah, it's this.

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[45] alphabet that stands for "Heil Hitler."

Q So HH repeated – I think H is the eighth letter, correct?

A Yes.

Q It's been a long time since kindergarten.

A Correct.

Q How would you describe the sophistication of white supremacist gangs in the prison population as opposed to other gangs?

A Typically much more sophisticated. You know, when we look at our statistics on white supremacists, and like the Aryan Brotherhood, what we have found is that, you know, their average age is much greater than any other gang, as a whole. You're looking at the average age somewhere around 38 years old.

On the average, they've served, you know, 12 to 14 years in prison, as opposed to much less – much lesser sentences as an aggregate of other gangs.

So what we find is that these – [46] these individuals are predominantly older inmates, that they've served more time in prison, that they're much more savvy in how they go about their business within – within the population, within prison. Because they know – they know how to play – play the system and – and use the system for their benefit.

Q Do they cause DRC more problems in detecting their activities than other gangs?

A Typically, yes. We've seen a real change amongst them where in the past they were much more blatant about their tattoos and self-admission and those things, where today we find a great many of them covering up their tattoos, not getting their tattoos. So it makes it much more difficult for us to identify them.

Q Okay. Now, overall, does DR – we've gone through all these files, and you were asked about them before and your general tracking system for gangs. Do you feel that DRC has identified all the inmates in its custody that are involved in gang

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[60] A [Putative Class Member #10]

Q And what's the security threat group that he's been associated with?

A It lists two. Aryan Brotherhood, slash, Skinhead.

Q Is there anything on this document that shows what religion [Putative Class Member #10] is?

A No, I don't believe so.

Q To your knowledge, is this security threat group related to Asatru in any way?

A Is the Aryan Brotherhood related to Asatru?

Q Asatru.

A Well, yeah, we believe there are a number of their members that are claiming to be – that are identified Aryan Brotherhood members that are claiming to be Asatru.

Q Are – okay. Can we look at No. 41.

Oh, actually, can I ask you one more question. You said that there are members of the Aryan Brotherhood who are claiming to be Asatru. Do you know who?

A Well, I don't know if I know them all specifically, but there's members that

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[63] MR. MARTI: Okay.

BY MS. CONN:

Q Could you tell me who this inmate is.

A [Putative Class Member #11]

Q And what's his security threat group that he's related to?

A White supremacist.

Q Okay. Can you move to Exhibit 43.

Could you tell me who this inmate is.

A [Putative Class Member #12]

Q And could you [sic] me what security threat group he's associated with.

A White supremacist.

Q Okay. Next exhibit, can you tell me Who this inmate is.

A [Putative Class Member #13]

Q And can you tell me what security threat group he's related to.

A Aryan Brotherhood.

Q Let's move to the next exhibit.

MS. CONN: Is that 45?

[64] MR. MARTI: 45.

BY MS.CONN:

Q Can you tell me who this inmate is.

A [Putative Class Member #14]

Q And can you tell me what security threat group he's related to.

A Pagan's Motorcycle Club.

Q And, to your knowledge, are the Pagan's Motorcycle Club related to Asatru in any way?

A I'm not aware.

Q Okay. Let's move to the next exhibit.

Can you tell me the inmate's name.

A [Putative Class Member #15]

Q Can you tell me the security threat group he's associated with.

A White supremacist.

Q Move to the next exhibit.

MR. MARTI: Excuse me. Let me just catch up here.

Okay. I'm sorry, go ahead.

BY MS. CONN:

Q Exhibit 49?

[65] A 47.

Q 47. Can you tell me this inmate's name.

A [Putative Class Member #16]

Q And can you tell me what security threat group he's related to.

A KKK.

Q Let's go to Exhibit 48.

Can you read the inmate's name.

A [Putative Class Member #17]

Q And what security threat group is he associated with?

A Aryan Nations.

Q Exhibit 49. What inmate – what's the inmate's name?

A [Putative Class Member #18]

Q And what security threat group is he associated with?

A White supremacist.

Q And Exhibit 50, what's the inmate's name?

A [Putative Class Member #19]

Q And what security threat group is he associated with?

[66] A Aryan Brotherhood.

Q Okay. In Exhibits 41 through 50, is there any place on this sheet that lets you know what religion these – any of these inmates are?

A Well, yes. The one I believe that – the Aryan Nation I believe to be a Christian Identity.

Q Which number?

A Exhibit 48.

Q Where – where do you see – can you point that out to me.

A Well, it says STG code is Aryan Nation.

Q Right. But does it – I guess what I'm asking is, is there anywhere on this sheet that asks what religion this inmate is?

A No, there's not.

Q Okay. You were talking earlier about how sometimes gang members try to cover their gang activity by using religion. And you said that they can – they have, in the past, requested to be celled together as

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[102] is a leader of the Asatru religion?

A Primarily because of the Publications that – that you read, et cetera, referencing him.

Q Which publications would those be?

MR. MARTI: Hold on a second now. Let's go off the record for a second.

(Discussion off the record.)

BY MS. CONN:

Q So the basis of your opinion that David Lane is the leader of the Asatru religion is in the documents that have been turned over by the Attorney General to the Plaintiffs?

A Yes.

Q Entirely? Are there any outside sources that are not in the materials?

A No, other than I would say that in talking to – interviewing people, or, you know, in general – general trainings, et cetera, you know, his name is one that comes up both by inmates and by – by, you know, staff or – or investigators other places as being one of the, you know, key people.

[103] Q Do you know where he's incarcerated? I know the federal system, but where?

A I – I don't know. I mean, I believe at one time he was at U.S.P. Marion, but I'm not sure where he is today.

Q Okay. That's not Marion, Ohio, is it?

A Marion, Illinois.

Q Okay. Now, you also testified Earlier today that white supremacists tend to be more sophisticated, they tend to be older. Do you keep statistics on the average age or the average time of incarceration of different members of STGs?

A We have recently, and done some on some individual groups. The statistics I'm referring to are ones that I put together, I believe, after the Lucasville riots in '93 or '94.

Q And could you please briefly describe those statistics.

A Basically what we did was looked at the average age of individuals who are identified within those groups, their

* * *

[105] Q So the fact that you said the white supremacists are more sophisticated and more organized doesn't make them any more of a threat than, say, the Hanafi Muslims – sorry, not the Hanafi Muslims, but the Outlaw Biker gangs, or the Crypts, or the Bloods?

A Well, you know, I said we consider them all – we consider them all potentially a threat to the security.

Now, you know, we've had – we have probably had more problems with groups like the Aryan Brotherhood than we have with any other gang that we have in our prison population.

Q Do you know what the average age for Hanafi Muslims is?

Was that – since they were involved in the Lucasville riot, did you do the analysis – the statistical analysis on the Hanafi Muslims?

A I did, and I don't know if I can recall offhand – I can't recall offhand what – what the average age was.

* * *

[114] MR. MARTI: I have a couple follow-up questions based upon what we just went over. Before we do, let's go off the record for a second.

(Discussion off the record.)

(Deposition Exhibits 51 and 52 marked.)

EXAMINATION
BY MR. MARTI:

Q Mr. Meyer, I'm handing you what's been marked as Exhibit 51. Can you take a moment and look that over for me, please.

A Okay.

Q Can you identify that document for me, please.

A It's titled "Odinism," by Wodensson, parentheses, David Lane.

Q Is that the David Lane we were talking about before?

A I believe so, yes.

Q Let me refer your attention up to the upper right-hand corner. There seems to be an internet address. Could you read that [115] for me, please.

A Yeah, HTTP, colon, slash, slash, WWW, dot, death to ZOG, dot, com, slash, the, slash, order, slash, lane, slash, Odinism, period, HTML.

Q Okay. Let me go over some of the elements in there and see if you can explain to us what they are.

What does death to – first of all, what is ZOG?

A ZOG is Zionist Occupied Government.

Q What does that generally refer to?

A That is a common reference by white supremacist groups of Jewish – Jewish-run government, basically, and that all government is run by – by Jewish people.

Q Is that – you mean basically their view is that all government is under Jewish domination?

A Correct.

Q And, so, I take it death to ZOG means –

A Death to Jewish people.

Q Okay. The Order – now, we [116] discussed The Order before. Are we referring to the same entity here, or is there any relation you're aware of?

A I believe it to be the same The Order that Lane was a part of when he was part of that criminal organization on the street.

Q He was part of The Order when he was on the street?

A I believe so, yes.

Q Now, is this one of the documents you referred to as having – giving you further evidence of a link between Odinism and white supremacists?

A Yes, it is.

Q Okay. Handing you what's been marked as Exhibit 52, would you take a moment and look that over for me, please.

(Pause in proceedings.)

THE WITNESS: Okay.

BY MR. MARTI:

Q Now, I notice on the first – the caption or the title of the document says "14 Word Press." Do those words mean [117] anything to you?

A The 14 Words I spoke of earlier, Referring to, "We Must Secure An Existence For Our People And A Future For White Children."

Q Are you familiar with an organization that goes by 14 Word Press?

A Yes, I am.

Q Could you describe it for us, please.

A Well, previously it was always in – in a published form that we received into the institution, but it's my understanding that 14 Word Press is put out by – by associates of David Lane, you know, through his people on the street. Obviously he can't put it out, but will write for the publications.

Q So there's an affiliation between David Lane and the 14 Word Press?

A I believe so, yes.

Q Okay. I'd like to direct your attention to Exhibit 47. Take a moment and look that over for me, please. [118] Are you familiar with that document?

A Yes, I am.

Q Okay. I notice – it seems to be – you testified earlier it's a gang profile – STG profile on [Putative Class Member #16] and I notice it says rank in STG, enforcer. Could you explain what that means.

A Typically an enforcer is – is someone within the group that's required to enforce the rules of the organization. And that if somebody gets out of line within the organization or that they – they're the ones that enforce the discipline on them.

They're usually the ones, also, that keep weapons, et cetera, for the group, or are responsible for making weapons for the group.

Q How do they go about enforcing the rules?

A They – typically, there's some type of reprisal for breaking rules. I mean, whether it be, you know, small things such as maybe a monetary fine, to assaulting them, or even in some cases, you know, [119] murdering them for breaking the – the bylaws, constitution of the group.

Q Okay. So it can include violence?

A Yes.

Q Okay. I'd like to direct your attention to Exhibit No. 48, which is an STG profile on [Putative Class Member #17] And I notice it says rank in STG, prophet. Could you explain what that means.

A Prophet is one who would be responsible for educating and teaching, most likely recruiting new people into the group.

They – the Aryan Nation, in his particular case – are a group that does a great deal of recruiting of younger

people, getting them to read certain materials, bringing them to the service or meetings, et cetera.

MR. MARTI: Let's go off the record for a second.

(Discussion off the record.)

MR. MARTI: Let me – let's go back on the record, and I'll state something and see if I've accurately summarized the [120] understanding between counsel.

Documents numbered 5470 through 5946 are the STG files on certain of the class members, or all the class members that we're aware of that have STG files.

Before the deposition started, we indicated that we would make all of those documents, which are rather voluminous, one exhibit, but that they wouldn't be kept with the other exhibits for the time being, although they would if the deposition is printed out.

Is that an accurate summary of our understanding?

MS. DOYLE: I think it is. And I just want to add that some of those documents we have previously referred to, I believe, in this deposition today, and in the preceding session we had by other exhibit names. So just for clarification, there may be some overlap.

(Deposition Exhibit 53 marked.)

[121] MR. MARTI: Fair enough. So then we agree that Exhibit 53 constitutes the STG files, documents 5470 through 5946?

MS. DOYLE: Yes.

BY MR. MARTI:

Q Mr. Meyer, I'd like to refer you to document 5470, which is part of the group we just talked about. Would you take a moment and review that for me, please.

(Pause in proceedings.)

THE WITNESS: Okay.

MS. CONN: Who is that?

MR. MARTI: I'm sorry, 5470.

MS. CONN: Who is that?

MR. MARTI: Oh, McGuire.

MS. CONN: Thanks.

BY MR. MARTI:

Q Can you identify it for me.

A Yeah, it's a printout on inmate [Putative Class Member #20]

Q I notice it says rank in STG, LT. What does that mean?

A It stands for lieutenant.

Q Can you describe what a lieutenant [122] in an Aryan Brotherhood is.

A Typically a lieutenant in the Aryan Brotherhood is responsible for a group of the prison, reports to the captain, and the captain is – there's usually only one captain at the prison. It could be more, depending on the compound.

The lieutenant is primarily responsible for an area or section of that organization. So a leader.

Q Okay.

A One of the leaders.

Q Now, I notice it says participation Level 3. What does that mean?

A Three stands for disruptive participation.

Q Okay. I'd like to refer you to 5476, the STG file for [Putative Class Member #6]. And it says rank in STG, innercircle. Do you know what that means?

A No, honestly, I'm not aware.

Q Okay. Fair enough.

I'd like to refer you to 5484, which is the STG profile on [Putative Class Member #4]. It says [123] rank in STG, leader, question mark. What does that mean?

A He is – he is considered to be a leader, and somebody that they look up to because of his – his murder of Officer Davis. And he would be considered a hero, I guess, in some circles, I guess, because of his willingness to commit that act.

Q Now, what race was Officer Davis?

A He was black.

Q I notice it says participation Level 3, what does that mean?

A Disruptive.

Q Okay. 5486, [Putative Class Member #19]. I notice it's a gang profile on [Putative Class Member #19], and it says participation Level 3.

A Correct.

Q Does that mean he's disruptive?

A Correct.

Q Do you recall what the nature – what – why he was classified as disruptive?

A If I remember correct – I'm going from memory – he was involved in an assault [124] of [redacted] at Mansfield. And if I remember correctly, it was – it was a matter of [redacted] was not following the rules, and [Putative Class Member #19] – [Putative Class Member #19] was responsible to – to basically check him and put him in his place for not following the rules of the organization.

Q When did that occur?

A '96, '97. I'm not exactly certain.

Q Okay. Okay. I'm referring you to 5490, the profile on [Putative Class Member #3]. It says rank in STG, associate. What does that mean?

A As far as we can tell, he's – he may not be a full-fledged member of the Outlaws, but is an associate of them, known to – known to hang with them.

MR. BRYSON: May – I'm sorry, there are two class members whose last names are [Putative Class Member #3].

MR. MARTI: I'm sorry. [redacted].

A Our intelligence shows that we don't – aren't certain whether he's a member or –

[125] Q Okay.

A – or just . . .

Q Okay. 5492, the profile on [Putative Class Member #5], it says rank in STG, vice-president. Could you explain what that means.

A The Iron Horsemen is a motorcycle club. Vice-president would be the number two person within that club on the street.

Q Okay. And what kind of duties would that type of person normally have?

A Depending on the clubs, on who – what Rank holds what, but probably planning rides, acting as the leader in the absence of the president, et cetera.

(Mr. Bryson left the deposition.)

Q Okay. Now, referring you to 5498, profile on [Putative Class Member #8], it says rank in STG, priest. What would that mean?

A Priest would most likely be a teacher, probably somebody that's had some experience within the group, could even be a leader of their particular Aryan Nation set.

Q What kind of duties would that type [126] of person have within the group?

A Leadership – leadership position. I mean, organizing meetings, holding services, et cetera, for the Aryan Nation.

Q Okay. Now, I actually should have asked you this earlier. Throughout this deposition and the earlier deposition – the earlier part of this deposition, in February, the term shakedown has come up. What does that mean?

A A shakedown is a process of going into an area, a cell – there's many different kinds of shakedowns, but predominantly it's searching – thoroughly searching an individual or property looking for contraband or, you know, major or minor contraband, either on an individual or in – in an area.

Q Okay. Are – are all inmates subject to shakedowns, whether they're STG affiliated or not?

A Yes.

Q And shakedown doesn't mean what it sometimes means in the vernacular. It's not

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Miller, et al., Plaintiffs,	Case No. C2-98-275
v.	Judge Sargus
Reginald Wilkinson, et al., Defendants.	Magistrate Judge Kemp
	CLASS ACTION

STIPULATION OF PARTIES

(Filed May 3, 2000)

The Parties hereby stipulate that, for the purposes of the above-captioned lawsuit only, the ancient Nordic religion of Asatrú and related sects of Asatrú are an authentic and genuine religion. Accordingly, neither Party will present evidence in this case as to genuineness or lack of genuineness of the Asatrú religion.

Respectfully submitted,

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(11)

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In The Supreme Court of the United States

JON B. CUTTER, et al.,

Petitioners,

vs.

REGINALD WILKINSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX VOLUME II, Pages 187 to 370

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN MILLER, et al.,	:	
Plaintiffs,	:	**Case No. C2-98-275**
v.	:	**MAGISTRATE JUDGE KEMP**
REGINALD WILKINSON, et al.,	:	**CLASS ACTION**
Defendants.	:	
JOHN GERHARDT,	:	
Plaintiff,	:	**Case NO. C2-95-517**
v.	:	**JUDGE SARGUS**
ALAN LAZAROFF, WARDEN, et al.,	:	**MAGISTRATE JUDGE KEMP**
Defendants.	:	

CONSOLIDATED PARTIAL MOTIONS TO DISMISS

* * *

[41] *See also, United States v. Faase*, ___ F.3d ___, ___, 2000 U.S. App. LEXIS 23708 at **14-15.

Those patterns are certain to occur here. We know from actual experience that RFRA forced state officials to reallocate resources in ways that interfered with the delivery of religious services to the majority of inmates in order to accommodate the needs of a small but vocal minority of adherents to unconventional faiths.[43] We also know that RFRA forced the states to absorb significant

[43] See notes 2 through 8, *supra*, and the corresponding text.

litigation burdens to comply with that legislation's federal mandate.[44] Those effects must reasonably be expected to follow RLUIPA given its close identity to RFRA. They are precisely the types of diversions and costs discussed in *New York* and *Printz*, but they will be borne by the states, not Congress. Further, there will undoubtedly be political costs exacted for using the tax dollars of Ohio's African American, Hispanic, and Asian citizens to accommodate, and hence effectively subsidize, Plaintiffs' "religious" expression, expression that advocates the disenfranchisement, if not the outright extermination, of Ohio's racial minorities. (Auth. 8). Unfortunately, "it will likely be [state elected officials], not some federal official, who will be blamed for" such a patently offensive use of public resources. *Printz*, 521 U.S. at 930.

New York and *Printz* conclusively establish that Congress cannot use its commerce powers to compel states to affirmatively regulate in accordance with federal policy choices. RLUIPA does exactly that, regulating the way states regulate one of the most highly regulated aspects of their internal operations. Moreover, it does so in a way that will force the states to absorb the costs of the regulatory regime it has imposed. It is hard to imagine a more flagrant violation of federalism.

* * *

[44] See notes 10, 11, and 12, *supra*, and the corresponding text.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN MILLER, et al.,	:	
Plaintiffs,	:	**CASE NO. C2-98-275**
v.	:	**MAGISTRATE JUDGE KEMP**
REGINALD WILKINSON, et al.,	:	**CLASS ACTION**
Defendants.	:	
JOHN GERHARDT,	:	
Plaintiff,	:	**CASE NO. C2-95-517**
v.	:	**JUDGE SARGUS**
ALAN LAZAROFF, WARDEN, et al.,	:	**MAGISTRATE JUDGE KEMP**
Defendants.	:	

CONSOLIDATED PARTIAL MOTIONS TO DISMISS
[Exhibits]

* * *

EXHIBIT A

Religious Land Use and Institutionalized Persons Act of 2000 (Engrossed in Senate)
S 2869 ES

106th CONGRESS
2d Session
S. 2869

AN ACT

To protect religious liberty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States-of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Religious Land Use and Institutionalized Persons Act of 2000'.

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS –

(1) GENERAL RULE – No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION – This subsection applies in any case in which –

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION –

(1) EQUAL TERMS – No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION – No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS – No government shall impose or implement a land use regulation that –

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE – No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION – This section applies in any case in which –

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION – A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION – If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT – Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES – Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended –

(1) by inserting 'the Religious Land Use and Institutionalized Persons Act of 2000,' after 'Religious Freedom Restoration Act of 1993,'; and

(2) by striking the comma that follows a comma.

(e) PRISONERS – Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT – The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than

this subsection, to institute or intervene in any proceeding.

(g) LIMITATION – If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED – Nothing in this Act shall be construed to authorize any government to burden any religious belief

(b) RELIGIOUS EXERCISE NOT REGULATED – Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED – Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government finding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED – Nothing in this Act shall –

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE – A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW – With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION – This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL – Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY – If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the 'Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term 'granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS – Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended –

(1) in Paragraph (1), by striking 'a State, or a subdivision of a State' and inserting 'or of a covered entity';

(2) in paragraph (2), by striking 'term' and all that follows through 'includes' and inserting 'term 'covered entity' means'; and

(3) in paragraph (4), by striking all after 'means' and inserting 'religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.'.

(b) CONFORMING AMENDMENT – Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking 'and State'.

SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT – The term 'claimant' means a person raising a claim or defense under this Act.

(2) DEMONSTRATES – The term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE – The term 'Free Exercise Clause' means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT – The term 'government' –

(A) means –

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION – the term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY – The term 'program or activity' means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

EXHIBIT B

AFFIDAVIT OF DAVID SCHWARZ

County of Franklin :
: ss
State of Ohio :

Now comes David Schwarz, having been first duly sworn, and states and affirms as follows:

1. I am the Religious Services Administrator for the South Region of the Ohio Department of Rehabilitation and Correction ("O.D.R.C."). I have held that position since May of 1984. As part of my job duties I am involved in facilitating the delivery of religious services in 14 correctional institutions of various security levels throughout the southern half of the state of Ohio. One of my primary duties is to consult with institutional staff regarding the delivery of religious services and operational issues involving religious matters. I am also involved in setting religious policies on a department-wide basis and was actively involved in working with the Office of the Ohio Attorney General in connection with litigation arising under the Religious Freedom Restoration Act of 1993 ("R.F.R.A."). My job duties also include developing new religious programming, recruiting paid staff and volunteers for the delivery of religious services and acting as a liaison between O.D.R.C. and the religious community at large. As a result of those duties I have personal knowledge of the matters set forth herein.

2. R.F.R.A. had a very significant, and adverse, impact upon the delivery of religious services to inmates within the custody of O.D.R.C., as discussed below.

3. Following the enactment of R.F.R.A. I had to dramatically increase the amount of time spent responding to litigation. More specifically, following the enactment

of R.F.R.A. I was forced to spend between fifteen to twenty percent of my time working with the Office of the Ohio Attorney General in connection with lawsuits filed under R.F.R.A. During my previous years as an employee of O.D.R.C. I spent little time on litigation related issues. Not only did that divert me from other, more pressing tasks, it was also very frustrating in that many of the lawsuits involved issues that had been resolved before the enactment of R.F.R.A.

4. The enactment of R.F.R.A. also dramatically increased the amount of time I spent consulting with institutional staff regarding compliance with legal requirements. I spent between sixty to seventy percent of my time working with institutional staff to determine how to comply with R.F.R.A. That consultation involved revisiting issues settled before the enactment of R.F.R.A. and responding to the very significant increase in inmates "religiously" motivated demands for special accommodations that followed the enactment of R.F.R.A. In addition, I had to spend a significantly increased amount of time dealing with issues that had previously been handled by security staff alone but which now involve "religious" issues due to inmates' claims of "religious" significance for acts that are more probably have secular motivations. (i.e. gang related activities.).

5. The cumulative result of the matters described in paragraphs 3 and 4 above was a very significant reduction in the amount of time spent on actually facilitating the delivery of religious services. Prior to the enactment of R.F.R.A. I spent the vast majority my time on the development of new religious programming, recruiting providers of religious services and working with the religious community at large to facilitate the provision of religious services to inmates. However, because I was forced to spend between seventy-five to ninety percent of my time on R.F.R.A. related issues I had much less time to spend on those

matters. In short, the enactment of R.F.R.A. forced me to change from taking a proactive approach to the delivery of religious services and other religious matters to adopting a reactive stance because of the need to respond to the increased litigation and operational problems caused by R.F.R.A.

6. Unfortunately, there was no way to avoid the problems described above. Indeed, I have observed that we had more litigation and operational issues in institutions where we make the most efforts to accommodate the religious demands of inmates.

7. As part of my duties I corresponded with my counterparts in the correctional systems of other states. They uniformly indicated that they were also experiencing similar operational and litigation related problems resulting from R.F.R.A.

8. In addition to the matters discussed above, enactment of R.F.R.A. resulted in less training on other topics being made available to chaplains at the various institutions operated by O.D.R.C. That was due to the fact that the increased problems caused by R.F.R.A. required that such training during the last 2 years that R.F.R.A. was in effect be disproportionately devoted to R.F.R.A.

9. In addition to the matters discussed above, less time was spent on the delivery of religious services following the enactment of R.F.R.A. because religious services personnel were required to expend increased amounts of time dealing with security issues, as discussed below.

10. Following the enactment of R.F.R.A. the number of inmate requests for accommodations of specific religious practices increased dramatically. That required religious services personnel to not only examine the religious necessity of each requested accommodation, how to meet the particular requirements each religion

imposed with regard to the subject matter of each request and to work with security and other institutional staff to determine whether each requested accommodation presented operational concerns. Time spent on such matters could be spent on tasks necessary to facilitate the delivery of other, nonproblematic, religious services.

11. Of greater concern was the fact that many gangs have adopted "religious" postures to, obtain protection for their illicit activities. For example, a number of white supremacist groups claimed to be pursuing Christian Identity beliefs and the tenants of the Church Of The Creator in an effort to cover their otherwise illicit, and disruptive, activities. Some of these groups were being actively supported in their misuse of R.F.R.A. by gang cohorts outside of prison. The cumulative result of these activities was that religious staff were required to devote significant amounts of time to investigating the legitimacy these "religious" groups and their "religious" claims in order to assist security staff in dealing with the problems posed by those groups, thereby limiting the amount of time available to facilitate the delivery of religious services to the vast majority of inmates of faith.

12. Another disturbing and disruptive pattern which arose following the enactment of R.F.R.A. that adversely affected the delivery of religious services is the proliferation of new "religions" within the confines of Ohio's prisons. Inmates, realizing the potential protection afforded by R.F.R.A., established several new "religions" which purported to require such accommodations as group martial arts classes. Those "religious" groups have required additional attention from religious services personnel in order to verify the authenticity and requirements of such "religions". Time spent on such tasks is time that cannot be otherwise spent upon the delivery of religious services to inmates adhering to unquestionably established religions.

13. I was a co-signatory of the letter of July 17, 1996 To Ohio Attorney General Montgomery describing the impact of R.F.R.A. on O.D.R.C., a copy of which is attached as exhibit 1 hereto. I reaffirm the truth of the matters asserted in that letter.

Further affiant sayeth naught

/s/ David Schwarz
DAVID SCHWARZ

Sworn to before me and subscribed in my presence this 19 day of October, 2000

/s/ Daniel F. Callahan
NOTARY PUBLIC

[SEAL] DANIEL F. CALLAHAN
Notary Public, State of Ohio
My Commission Expires 11-30-04

July 17, 1996

Ms. Betty D. Montgomery
Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0581

Re: The Effect of the Religious Freedom Restoration Act of 1993 on the Delivery of Religious Services in Ohio's Prisons

Dear Attorney General Montgomery,

We are writing as the Directors of Religious Services of the Ohio Department of Rehabilitation and Correction to describe the effect of the Religious Freedom Restoration Act of 1993 ("RFRA") on the delivery of religious services in Ohio's prisons. Ironically, RFRA has adversely affected the delivery of such services by limiting both the quantity

and quality of staff time that can be devoted to religious matters.

Quantitatively, RFRA has forced religious services personnel to be diverted from tasks necessary to meet the spiritual needs of Ohio's inmates in order to respond to the significant legal and operational problems that have followed its enactment. Prior to RFRA, the Ohio Department of Rehabilitation and Correction ("ODRC") took a proactive approach to meeting the religious needs of inmates and we spent the vast majority of our time developing programming, recruiting and working with paid and volunteer providers of religious services and working with the religious community at large regarding the needs of inmates. We were seldom involved in litigation or problems of statutory compliance.

Unfortunately, that changed dramatically after the enactment of RFRA. We now spend approximately 75 to 90 percent of our time dealing with legal and operational problems directly related to RFRA. More specifically, we spend between 15 to 25 percent of our time working with attorneys from your office on lawsuits arising under RFRA. In addition, we spend between 60 to 70 percent of our time consulting with institutional staff regarding compliance with RFRA. The cumulative result of those developments has been that we are now forced to take a reactive approach to religious matters, as opposed to our traditionally proactive approach.

That dramatic change has two interrelated causes. The first is that RFRA's least restrictive means test requires us to effectively "set up and shoot down" all possible alternatives for dealing with "religiously motivated" requests for alterations of normal prison operations. Considering and

evaluating those mostly unworkable alternatives is tremendously time consuming. Time spent on those matters cannot be spent on facilitating the delivery of religious services of a non-disruptive nature.

Secondly, inmates and inmate groups have recognized, and abused, the fact that RFRA has shifted the burden of proof in religious matters. Since RFRA's enactment we have seen the proliferation of new, inmate created "religions" with such bizarre demands as group martial arts classes. In addition, we have seen a very large increase in requests for accommodations for previously unrecognized "requirements" of existing religions. Even more frighteningly, a number of inmate gangs, including racial hate groups, have claimed "religions" status in order to insulate their illicit and disruptive activities from scrutiny by correctional staff. Although most abuses are ultimately detected and dealt with, that only occurs after a tremendous investment of time by religious services staff who must investigate the "religious" nature of the groups or faiths at issue and the "religious" basis for the individual accommodations requested. Once again, time spent on such tasks cannot be spent on the actual delivery of the services to inmates adhering to unquestionably legitimate and sincerely held religious beliefs.

Not only is that division of resources very disruptive, it is also very wasteful. Most of the accommodations sought involve matters that were analyzed and rejected under Pre-RFRA legal standards. However, R.F.R.A. has required that those matters be revisited, effectively requiring that each problem be analyzed twice. Once again, time spent on those largely redundant tasks is time that cannot be spent on the delivery of religious services that are not subject to any dispute.

The effect of RFRA on the quality of staff time devoted to delivery of religious services has been equally, if not more, deleterious. Prior to the enactment of RFRA religious services personnel were usually able to maintain a "pastoral" type of relationship with individual inmates, regardless of the faith of the individual staff member or inmate. However, because of the increased number of increasingly bizarre demands and the increasing militancy of inmates making such demands, religious services staff are becoming more skeptical, thereby straining the relationship from the perspective of the staff members. Similarly, because staff are increasingly required to demand proof of the religious basis for requested accommodations and frequently forced to deny requested accommodations inmates are beginning to view religious services personnel more as "enforcers" of staff authority than as pastors. That hardly fosters the type of open, mutually accepting relationship that is vital to the effective delivery of religious services.

As the foregoing makes clear, RFRA has had a very significant and very adverse effect on the delivery of religious services in Ohio's prisons.

Sincerely,

_____	/s/ David Schwarz
Marloe Karlen	David Schwarz
Director of Religious Services	Director of Religious Services
North Region	South Region
Department of Rehabilitation and Correction	Department of Rehabilitation and Correction
1050 Freeway Drive	1050 Freeway Drive
Columbus, Ohio 43229	Columbus, Ohio 43229

EXHIBIT C

AFFIDAVIT OF KIM TUCKER

City of Washington :
: ss
District of Columbia :

Now comes Kim Tucker, having been first duly sworn, and states and affirms as follows:

1. I am Deputy General Counsel for the Florida Attorney General's office. I have held that position since March of 1996. As part of my duties in that position I oversaw a survey of state and territorial correctional agencies on the impact of the former Religious Freedom Restoration Act ("RFRA").

2. In July of 1996 I prepared a memorandum summarizing the results of that survey. A true, complete and accurate copy of that memorandum is attached as exhibit I hereto.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Kim Tucker
KIM TUCKER

Sworn to before me and subscribed in my presence this 19th day of October, 2000

/s/ Warren Edward
NOTARY PUBLIC
My commission
expires 01-01-2005

EXHIBIT 1

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MEMORANDUM

TO: Robert A. Butterworth
Attorney General

Harry Singletary
Secretary
Florida Department of Corrections

FROM: Kim Tucker
Deputy General Counsel

DATE: July 19, 1996

RE: Preliminary Results of the RFRA Survey of All States: The Impact of the Religious Freedom Restoration Act on State Correctional Systems

This is to summarize the preliminary results of the national survey on the impact of the Religious Freedom Restoration Act (RFRA) on state correctional systems.

As you know, RFRA's mandated abandonment of the constitutional standard for review of free exercise of religion claims in the prison context, enunciated by the U.S. Supreme Court in *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987), has had a tremendously negative impact in Florida. RFRA has resulted in a significant increase in the number of claims for exemptions from security regulations and requests for special privileges. It has also resulted

in an increase in the number of cases brought claiming the right to exemptions under this Act, increased the cost in staff and financial resources to evaluate and litigate such claims, and has required Florida as a State to relitigate claims previously won even under the Eleventh Circuit's pre-*O'Lone* "strict scrutiny" standard. What is most distressing is the nature of the recent prison actions. If anything, the recent RFRA claims are more bogus or bizarre than our previous experience.

At the Spring meeting of the National Association of Attorneys General (NAAG), in Washington, D.C., it became painfully apparent that other states were experiencing similar deleterious consequences from the application of this Act in the prison context. This issue was raised by the Attorney General to both the President and Attorney General Janet Reno. General Reno responded by requesting additional information on the costs and consequences of RFRA in prisons and jails. As a result, we undertook the process of surveying all states, the District of Columbia, and the U.S. Territories and Commonwealths on the impact of RFRA on their correctional systems. Surveys were sent by NAAG to the Attorneys General and Secretary Singletary sent surveys to each of the Directors of correctional systems in the States and Territories, as well as several of the larger jail systems. Pursuant to your direction, I am managing the collection and assessment of the survey responses.

I am pleased to report that of the 56 States and Territories to which the survey was sent, we have received responses from the Attorneys General and Department of Corrections in 33, so far, and we have been provided assurances from the others that their responses are in progress.

As discussed more fully below, RFRA has had a very significant, and very adverse, impact upon corrections systems in three major ways. First, RFRA has been utilized by racial hate groups and other inmate gangs to insulate their activities from the oversight and control of corrections officials. Second, there has been a tremendous increase in the number of lawsuits and internal demands for "religiously motivated" alterations of prison practices, creating significant burdens on the resources of corrections systems, state attorneys general, and the courts. The enactment of RFRA has resulted in the proliferation of claims for exemptions from prison security regulations and requests for special privileges, grounded in obscure or previously little-known "religions", including: Wicca, Satanism, Odinism, Asartu, and Luciferianism. Third, the enactment of RFRA has been followed by a reduction in the availability of religious programming in some state correctional systems.

Perhaps the most prevalent and disturbing pattern is the use of RFRA by inmate groups to insulate their activities from regulation by prison officials. Inmate groups and gangs have recognized that RFRA's "least restrictive means" test makes it very difficult for corrections officials to restrict activity allegedly motivated by religion and, consequently, have claimed religious status for their groups and religious motivation for their actions. Where previously prison officials successfully prevented gangs from wearing colors or emblems, these same groups now assert the right to wear special clothing or medallions as expressions of religious freedom. Since the federal courts are loathe to challenge the sincerity of religious claims and because it is difficult to overcome the "least restrictive means" test in the assertion of this type of claim, this

providing inmates an avenue for circumventing the legitimate security concerns of correctional institutions and encouraging the proliferation of gangs in prisons. Like Florida, most states responding to the survey have indicated that this pattern is being employed by racial hate groups, such as the Aryan Nation, as well as street gangs.

A second common and disturbing pattern is a tremendous drain on the resources of state correctional systems, State Attorneys General, and the courts. Most states have reported a significant increase in the number of inmate lawsuits asserting religious claims since the enactment of RFRA. There have been particularly noticeable increases in the States of Arizona and New York. Most lawsuits involve issues settled prior the enactment of RFRA, under the analysis established in *O'Lone*. This mostly redundant litigation requires correctional systems to divert employees from their normal tasks, requires State Attorneys General to devote significant staff to defend, and ties up court dockets across the country, in both state and federal courts.[1] Similarly, most of the responding states have noted significant increases in the number, belligerency, and unusual nature of inmates' internal demands for "religiously motivated" alterations to and exemptions from

[1] Not only has there been a significant increase in the free exercise lawsuits since the enactment of RFRA, conversations with Assistant Attorneys General and staffs of Department of Corrections of other States has indicated that the individual cases are more time consuming and costly than prisoner suits under the previous Constitutional standard. During this year's NAAG Corrections Conference, in Albuquerque, NM, and in a recent NAAG conference call on RFRA, attorneys from several States related that courts are reluctant to dispose of such cases on summary judgment or similar grounds because of factual and legal questions about the religious necessity of the requested "accommodations."

prison regulations. The large number of those requests, together with RFRA's "least restrictive means" requirement, are resulting in very significant burdens on the already overburdened corrections staffs due to the need to investigate the religious necessity and security impact of each of the growing number of demands.

Finally, and most ironically, the survey indicates that RFRA has actually resulted in a decrease in religious programming for most inmates in some States. The increased demands on staff time, described above, means that prison chaplains have less time to actually deliver religious services. In addition, increased demands for time and space by adherents to such previously obscure "religions" as Satanism, Wicca, Asatru, and Odinism[2] has resulted in less time and space being available for adherents of wide-spread, mainstream religions. Moreover, the increased stridency of inmate demands and doctrinal conflicts between inmates and potential volunteers has resulted in less programming being available from outside groups, who had previously serviced the inmate populations.

[2] Prior to enactment of RFRA, these "religions" were rare or unheard of in the prison context. The survey indicates, however, that inmate claims of conversion to these "religions" has proliferated since enactment of RFRA. Similarly, RFRA has spawned a surfeit of inmate claims for special privileges and exemptions, allegedly grounded in the Native American religion; however, overwhelming these claims are asserted by inmates with no previous or legitimate claim to tribal affiliation. (e.g. claims of Virginia inmates Randall "Lone Wolf" Mullins and William "Two Eagles" Martin to the right to possess feathers from endangered eagles, despite federal law prohibitions against possession of such feathers by individuals who do not have an identification number from the Bureau of Indian Affairs. Ironically, the Justice Department has intervened in this case on the inmates' behalf.)

Finally, some States have become so frustrated with the difficulties resulting from RFRA that they have eliminated all State-funded religious programming in their prisons.[3]

AFFIDAVIT OF TODD MARTI

County of Franklin :
: ss.
State of Ohio :

Now, comes Todd Marti, having first been duly sworn, and states and affirms as follows:

1. He was lead counsel for the Defendants in the case of *Syder v. Voinovich, et al.*, Case No. C2-94-536 (S.D. Ohio).

2. Since January 8, 1996, the Defendants in *Syder v. Voinovich, supra*, made key managerial staff, other employees and contract provides of both the Ohio Department of Rehabilitation and Correction ("ODRC") and the Ohio Department of Youth Services ("DYS") available for approximately 85.5

[3] The Departments of Corrections in Oklahoma and Colorado have discontinued State-funded Chaplaincy programs. Not all reductions in services to mainstream religions are intentional. For example, officials in Wyoming felt compelled by RFRA to allow a group of "Luciferians" to have an unsupervised service in the prison chapel. In an apparent burst of religious enthusiasm, the Luciferian inmates burned Christian hymnals and Bibles, making the books unavailable for Christian inmates to use, causing substantial smoke damage to the Chapel (thus, making it unavailable for general use by other inmates until repaired), and, obviously, creating a significant safety hazard to the life and safety of all inmates and staff within the institution.

hours of depositions. The deponents and time involved in actually attending those depositions are accurately set forth in Exhibit 1 hereto. In addition to the time spent actually attending those depositions, the deponents spent a total of approximately 40 hours preparing for and traveling to and from those depositions.

3. In addition to the 26 requests for production of documents set forth in each of the 26 sets of interrogatories served by the Plaintiffs, the Plaintiffs have made 287 additional requests for documents since January 8, 1996, in *Syder v. Voinovich*, *supra*.

Further affiant sayeth naught.

/s/ Todd Marti
TODD MARTI

Sworn to before me and subscribed in my presence this 23 day of October, 2000.

SEAL

/s/ Stuart A. Cole
NOTARY PUBLIC

STUART A. COLE
ATTORNEY AT LAW
NOTARY PUBLIC – STATE OF OHIO
MY COMMISSION HAS NO
EXPIRATION

Exhibit 1

DEPONENT	POSITION	DATE AND TIMES OFF DEPOSITION	DURATION OF DEPOSITION
Christine Money	Warden, Ohio Reformatory for Women	February 5, 1996 10:00 a.m. - 4:00 p.m.	6 hours*
Arthur Tate	Warden, Belmont Correctional Institution	February 7, 1996 9:00 a.m. - 3:00 p.m.	6 hours
John Littlefield	Director of Education, Department of Youth Services	February 8, 1996 9:00 a.m. - 6:30 p.m.	9.5 hours
Rev. Marloe Karlen	Religious Services Director, North Region of O.D.R.C.	February 12, 1996 9:00 a.m. - 6:30 p.m.	9.5 hours
Rev. David Schwarz	Religious Services Director, South Region of O.D.R.C.	March 21, 1996 9:00 a.m. - 6:30 p.m.	9.5 hours
Allen Lazaroff	Warden, Orient Correctional Institution	April 5, 1996 9:00 a.m. - 6:10 p.m.	9 hours
Curtis Wingard	Warden, Madison Correctional Institution	April 9, 1996 7:30 a.m. - 1:30 p.m.	6 hours
Frank Vloch	Chaplain, Mansfield Correctional Institution	April 12, 1996 8:00 a.m. - 5:30 p.m.	8.5 hours
Thomas Sunhawk	Contract Chaplain Orient Correctional Institution	April 29, 1996 9:30 a.m. - 5:45 p.m.	8.25 hours
Gregory Trout	Chief Counsel of O.D.R.C.	May 15, 1996 9:45 a.m. - 10:45 p.m.	1.75 hours
Matthew Myer	Security Threat Group Coordinator O.D.R.C.	June 19, 1996 9:00 a.m. - 5:30 p.m.	8.5 hours
Reginald Wilkinson	Director O.D.R.C.	June 28, 1996 9:00 a.m. - 12:00 p.m.	3 hours*

*These deposition have not yet been concluded, but instead were only continued to allow the Plaintiffs to conduct further interrogation of the deponent.

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EXHIBIT D

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BEST AVAILABLE COPY

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Exhibit E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Steve Syder, et al.,

Plaintiffs,

-V-

Case No. C-2-93-0074
C-2-94-0536
C-2-94-0795
C-2-94-1105
C-2-95-0056
C-2-95-0234
C-2-95-0290
C-2-95-0422
C-2-95-0429
C-2-95-0483
C-2-95-0566
C-2-95-0694
C-2-95-0695
C-2-95-1028
C-2-95-1073

JUDGE SMITH

Governor George V. Voinovich, et al.,

Defendants.

ORDER

(Filed Mar. 31, 1998)

Plaintiffs, state prisoners, bring claims under the Religious Freedom Restoration Act of 1993 ("RFRA") and the Free Exercise Clause of the First Amendment to the United States Constitution. Plaintiffs assert that

defendants are violating their rights by requiring them to cut their hair pursuant to prison regulations, in derogation of plaintiffs' right to exercise their belief in Native American Religion.

The U.S. Supreme Court struck down RFRA as unconstitutional in *Boerne v. Flores*, 117 S.Ct 2157 (1997). Furthermore, the United States Court of Appeals for the Sixth Circuit has held that prison hair length regulations are rationally related to legitimate penological interests and therefore do not violate the First Amendment's Free Exercise Clause. *Pollock v. Marshall*, 845 F.2d 656, 658-59 (6th Cir.), *cert. denied*, 488 U.S. 987 (1988).

Given the conclusive nature of *Boerne* and *Pollock*, further litigation of these cases would be a waste of the court's and parties' resources. The Court finds that in light of the above authorities, the complaints are deficient as a matter of law.

The Court GRANTS the motion of plaintiffs' counsel to withdraw (Doc. 59 in Case No. C-2-94-536).

The Court DENIES the pending motions to join (Docs. 53, 55, and 65 in case No. C-2-94-536).

The Clerk shall reopen these cases to enter final judgements in these actions, in favor defendants, and against plaintiffs, dismissing these actions with prejudice.

The Clerk shall remove these cases from the Court's pending cases and motions lists.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

EXHIBIT F

AFFIDAVIT OF JEFFREY MATHEW

County of Pickaway :
: ss
State of Ohio :

Now comes Jeffrey Mathew, having been first duly sworn, and states and affirms as follows:

1. He is Deputy Warden for Indirect Services at the Circleville Juvenile Correctional Facility. He has held that position since September 2000. Prior to that time he was the Deputy Warden for Administration at the Madison Correctional Institution. Prior to taking that position he was an investigator for the Ohio Department of Rehabilitation and Correction ("ODRC"), assigned to the Legal Services Office of ODRC on a full-time basis to assist the Office of the Ohio Attorney General in litigation against ODRC and its employees. Prior to undertaking that assignment, he has worked for ODRC as, *inter alia*, a Deputy Warden, as an Assistant Chief Inspector, and as an Administrative Assistant to the Warden. He has more than 23 years of experience in corrections.

2. As part of his duties, he worked with officials at the Central Office of ODRC, with officials at each of ODRC's 28 correctional institutions and with ODRC's training academy in order to gather the

information sought in the interrogatories and requests for production of documents served or otherwise made by the Plaintiffs in *Syder v. Voinovich, et al.*, Case No. C2-94-536 (S.D. Ohio), a case brought under the Religious Freedom Restoration Act. He personally spent more than 125 hours gathering that information. In addition, he spent approximately 150 hours organizing, copying, numbering, and performing other tasks in connection with the documents requested in order to make those documents useable.

3. In order to gather the information necessary to respond to the Plaintiffs' interrogatories and document requests in *Syder v. Voinovich, supra,* he made three complete surveys of ODRC's 28 correctional institutions. and a number of follow-up inquiries with various of those institutions. In addition he made searches at the Central Office at ODRC and reviewed materials from ODRC's training academy. In order to obtain the information requested, he enlisted the help of key administrative staff at those institutions and offices. Based upon his communications with those staff members and his own experience in responding to similar surveys in the past, he estimates that employees of ODRC had to spend approximately 600 hours of time to gather the information prepared to date. *That is an extremely conservative estimate of time spent gathering that information.* Furthermore, that estimate does not include the time spent by ODRC employees in responding to the large number of separate requests for documents made by the Plaintiffs in *Syder v. Voinovich, supra,* in addition to those set forth in the Plaintiffs' sets of interrogatories and requests for production of documents.

Further affiant sayeth naught.

/s/ Jeffrey Mathew
JEFFREY MATHEW

Sworn to before me and subscribed in my presence this 18th day of October, 2000.

/s/ Deborah S. Turner
NOTARY PUBLIC

[SEAL] DEBORAH S. TURNER
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES JAN. 4, 2001

EXHIBIT G

AFFIDAVIT OF SHARON SUMNER

County of Franklin :
: ss
State of Ohio :

Now comes Sharon Sumner, having been first duly sworn, and states and affirms as follows:

1. She is a Paralegal assigned to the Corrections Litigation Section of the Office of the Ohio Attorney General ("O.A.G."). As a result of her duties in that position she has personal knowledge of the matters set forth herein.

2. As part of her job duties she has conducted an inventory of cases filed by Ohio inmates under the Religious Freedom Restoration Act of 1993 ("R.F.R.A.") for use in a national survey of the impact of R.F.R.A. on prison administration.

3. The Ohio Attorney General is currently defending the Ohio Department of Rehabilitation and Corrections ("O.D.R.C.") and its employees in 75 cases initiated by inmates under the R.F.R.A. 53 of those cases involve the validity of the Grooming Code established by Ohio Administrative Code §5120-9-25(F). The vast majority of those 75 R.F.R.A. cases involve types of claims that had previously been resolved against inmates, prior to the enactment of R.F.R.A.

4. Since the enactment of R.F.R.A. the O.A.G. has had to defend against R.F.R.A. claims in a wide variety of state and federal courts, including the United States Supreme Court, the United States Court of Appeals for the Sixth Circuit, the United States District Court for the Southern District of Ohio in Cincinnati and Columbus, the United States District Court for the Northern District of Ohio in Akron, Cleveland and Toledo, the Ohio Supreme Court, the Ohio Court of Appeals for the Third Appellate District, the Ohio Court of Appeals for the Fourth Appellate District, the Common Pleas Court for Marion County, the Common Pleas Court for Montgomery County, the Common Pleas Court for Ross County, the Common Pleas Court for Scioto County and the Common Pleas Court for Warren County.

Further affiant sayeth naught.

/s/ Sharon Sumner
SHARON SUMNER

Sworn to before me and subscribed in my presence this 12th day of July 1996.

/s/ Joshua T. Cox
NOTARY PUBLIC

JOSHUA T. COX
Notary Public, State of Ohio
My Commission Has No Expiration Date
Section 147.03 O.R.C.

EXHIBIT H

AFFIDAVIT OF SUSAN CALDERON

County of Franklin :

State of Ohio :

Now comes Susan Calderon, having been first duly sworn, and states and affirms as follows:

1. I was a paralegal for the Corrections Litigation Section of the Ohio Attorney General's office from September of 1998 through September of 2000. As a result of my duties in that position I have personal knowledge of the matters set forth herein.

2. As part of my duties in the above described position I was asked to review the disciplinary records of each member of the plaintiff class in the case of *Miller, et al v. Wilkinson, et al,* Case No. C2-98-275 (S.D. Ohio) identified by the Plaintiffs. I prepared a chart summarizing the results of that review, a true complete and accurate copy of which is attached as exhibit 1 hereto.

3. The chart attached as exhibit 1 sets forth the name of each class member identified by the Plaintiffs in a column going down the left side of

the chart. The next column to the right identifies the Bates stamp numbers of the summary of each plaintiff's prison disciplinary history The next eleven columns to the right refer to various subsections of Ohio Admin. Code § 5120-9-06(E), referenced by the subdivision of that regulation involved and a brief description of the conduct prohibited by each subsection. The numbers in each column for each class member refer to the Bates stamp numbers of the documents evidencing disciplinary proceedings regarding each violation or alleged violation.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Susan I. Calderon
SUSAN CALDERON

Sworn to before me and subscribed in my presence this 23rd day of October 2000.

/s/ Maria C. Jenkins
Notary Public

MARIA C. JENKINS
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION
EXPIRES OCT. 1, 2001

Miller, et al. v. Wilkinson, et al.
Case No.
RIB FILES

Name		RIB Record	(4) Creating a Disturbance	(5) Fighting	(12) Threats	(14) Disrespect to an Officer	(16) Act Which Constitutes Threat to Security	(17) Aiding and Abetting Class II Violation	(19) Any Act Considered Felony or Misd	(24) Lying	(31) Gang Activity Involvement	(32) Self-multilation/ Tattooing	5120-9-37 Group Activity
Dattilo 301-729		1321 1330 1362 1371 1379				1391-1398				1336-1343		1355-1361	
Hall 277-848		1431	1432-1434									1432-1434 1456-1463	
Holland 319-713		1467				1480-1487			1475-1479				
Howington 315-531		1495 1509											
Lemasters 276-290		1529	1537-1546		1559-1562	1537-1546 1550-1558							
Malin 326-032		None											
Parish 251-744		1586 1591 1630 1640 1669 1781 1792 1823 1843 1858				1726 1859-1867		1639 1670-1677		1641-1649 1825-1828			
Schrock 285-016		1868	1882-1892					1872-1875					
Stump 253-213		1896						1960-1963				1942-1944 1984-1987	
McClellan 288-778		1988				1989-1990 2008-2010 2013-2014 2017-2018 2021-2022							

Name		RIB Record	(4) Creating a Disturbance	(5) Fighting	(12) Threats	(14) Disrespect to an Officer	(16) Act Which Constitutes Threat to Security	(17) Aiding and Abetting Class II Violation	(19) Any Act Considered Felony or Misd	(24) Lying	(31) Gang Activity Involvement	(32) Self-multilation/ Tattooing	5120-9-37 Group Activity
						2047-2048 2050-2051							
Bailey, Michael 141-957		2086 2160		2054-2083		2087-2157			2054-2083				
Dauterman, James 226-727		2178											
Riling, Kenneth 175-113		2179- 2180	2217-2226 2236-2246 2386-2396	2236-2246 2253-2266 2291-2306 2321-2335		2217-2226		2271-2290 2349-2352		2271-2290			
Culp, (E)rick 258-184		2397				2399-2409					2520-2521		
Allen, Jason 313-684		2545		2557-2570	2612-2626					2627-2635			
Hampton, Frank 245-095		2642		2775-2789	2686-2687 2725-2733	2717-2718 2725-2733		2722-2724	2686-2687	2671-2679 2748-2770	2685		
Taylor, Paul 334-355		n/a 2790											
Blank, Randall 325-409		n/a 2791- 2792											
Allen, David 309-572		2793 2808											
Klinger, 319-449		2829											
Parker, 340-729		2852 2856 2869				2836-2848			2849-2851 2853-2855 2857-2868 2870-2873	2836-2848			
Salter, James 336-706		2874 2883				2875-2882							
Vargo, 301-052		None		2916-2924	2897-2905 2925	2925							
Blankenship, Darryl 295-771		2926											
Miller, John William 199-891		2941 2963 2984	2985	2946-2962 2964 2975-2983	2946-2962 2964 2967 2987?	2990-2993 2998-2999							

Name		RIB Record	(4) Creating a Disturbance	(5) Fighting	(12) Threats	(14) Disrespect to an Officer	(16) Act Which Constitutes Threat to Security	(17) Aiding and Abetting Class II Violation	(19) Any Act Considered Felony or Misd	(24) Lying	(31) Gang Activity Involvement	(32) Self-multilation/ Tattooing	5120-9-37 Group Activity
Detty, Mark 336-829		3000										3020-3022	
Semenchuck, Allen 156-157		3075	3135-3143	3053-3054 3067-3074 3118-3128 3135-3143			3135-3143		3035-3052 3118-3128				
Millsaps, William 281-588				3183-3203									
Ferrell, 272-486											3228-3235 3236		
Blankenship, Randall 164-826				3255-3256									
Bedzyk, 204-234			3290-3297	3290-3297	3298-3300								
Baldock 140-527		3305- 3306	3496-3498			3414-3424 3496-3498 3535-3545		3317-3318 3330-3331 3460-3461 3499-3501 3512-3515 3581-3582		3316		3346-3352	
Gromnicki 276-765		3601											
Hart, 360-286													
Roosevelt, 303-591		3676											
Sloan, L 247-161		3691- 3692 3704- 3705 3714 3737 3751 3754 3770	3828-3829	3830-3836			3756	3801-3802 3855-3857			3815-3827		
Sparling 336-155			3905-3907 3940-3954	3905-3907		3926-3939 3940-3954		3898-3904				3883 3898-3904 3910-3917 3918-3924	

Name		RIB Record	(4) Creating a Disturbance	(5) Fighting	(12) Threats	(14) Disrespect to an Officer	(16) Act Which Constitutes Threat to Security	(17) Aiding and Abetting Class II Violation	(19) Any Act Considered Felony or Misd	(24) Lying	(31) Gang Activity Involvement	(32) Self-multilation/ Tattooing	5120-9-37 Group Activity
Spradling 251-925		3955 3971 4017	3979-3980		3985-3987				3973-3978		3967-3970		
Ritchie 317-294		4065 4082 4121	4055-4064 4074-4083			4031-4041 4055-4064 4074-4083				4087-4090 4113-4122			
Kaufman 375-495		4147				4152-4155							
McGuire 314-489		4156	4174-4193	4255-4265		4157-4169 4174-4193 4276-4284							
Williamson, 275-009		4294	4295-4298	4300-4301									
Slider, 157-322			4306-4308			4306-4308							
Howard, 234-577		4489- 4491	4338-4341 4392-4402 4518-4521	4342-4363 4378-4389 4392-4402 4410-4411 4548-4554	4522-4524	4408-4409 4412-4413			4342-4363 4378-4389 4428-4440		4513-4514		
Rose, 337-221		4569					4574-4584						
Mitchell, 361-584													
Crace 347-558		4733 4746 4756 4777 4796 4823 4844 4849 4861 4870 4893		4778-4795 4932-4942 4950 5008-5014 5023-5025 5096-5104	4932-4942 4950	4747-4749 4798-4801 4831-4848 4923-4931 4944-4945 4977-4989 5027-5042		5044-5048		4759-4776 4802-4804 4850-4851 4858-4869 4871-4875 4880 4886 4990 5044-5048 5087-5089		4731-4745 4859 4888	
Elliott, James 360-995				5122-5129					5163-5177				
Bauman 325-571								51935195					

Name		RIB Record	(4) Creating a Disturbance	(5) Fighting	(12) Threats	(14) Disrespect to an Officer	(16) Act Which Constitutes Threat to Security	(17) Aiding and Abetting Class II Violation	(19) Any Act Considered Felony or Misd	(24) Lying	(31) Gang Activity Involvement	(32) Self-multilation/ Tattooing	5120-9-37 Group Activity
Richendollar, Joseph 380-009			5214-5217	5235-5251		5214-5217							
Matz, David 331-280					5300-5307 5321-5322					5285-5291			
Rine, Gerald 198-582				5338-5345		5323-5332							
Lower, Bruce 203-800				5346-5362		5399-5416				5399-5416		5380-5387	
Hayes, Carl 269-235													

265

Exhibit I

AFFIDAVIT OF MATTHEW MEYER

COUNTY OF FRANKLIN:

ss: :

THE STATE OF OHIO:

Now comes Matthew Meyer, having been first duly sworn, and states and affirms as follows:

1. He is the Security Threat Group/Investigation Coordinator for the Ohio Department of Rehabilitation and Correction ("ODRC") and has held that position since December of 1994. Among his duties in that position are to monitor and take actions to minimize Security Threat Groups ("STG") activity within ODRC's 31 correctional institutions and facilities and among inmates under the jurisdiction of the Ohio Adult Parole Authority. In addition to his Bachelors Degree in Criminal Justice and Masters Degree in Public Administration he has participated in extensive formal training regarding STG activity. Among the courses he has taught or attended are the U.S. Justice Department's course on Asian organized crime, the Annual Conference of the Midwest Gang Investigator's Association (three times), the Major Gang Task Force Conference (three times) and courses and conferences presented by Central State University, the Ohio State Highway Patrol, the Ohio Attorney General and ODRC. He is a member of the Midwest Gang Investigator's Association, Advisory Board Member for the National Major Gang Task Force and the Wood County Gang Task Force. As a result of his duties with those organizations he has personal knowledge of the matters set forth herein, unless specifically noted.

2. Gangs are commonly referred to as Security Threat Groups ("STG") by corrections professionals. In general, STG activity is a very serious problem within ODRC's institutions. It is a significant cause of violence between inmates as a result of intra and inter-gang disputes. STG activity within the correctional setting creates alternate power structures that directly threaten the security of the institution through the commission of Ohio statutory law violations, violations of rules of inmate conduct and resistance to the authority and orders in prison staff. This conduct facilitates drug dealing, escape attempts, assaults, etc. STG [sic] exist in prisons for power, and power is obtained by maintaining structure and hierarchy. Such alternate power structures pose a direct threat to ODRC's ability to maintain safety and security within its prisons.

3. In addition to the general problems described in paragraph (2) above, STGs present a number of specific operational problems because they:

   - Heighten tension between inmates
   - Often result in "arms races" between rival groups
   - Increase the risk of inmate on inmate violence
   - Increase the risk of injury to Staff both in terms of assaults from inmates and in breaking up inmate on inmate altercations
   - Require the alteration of normal operational patterns in order to separate inmates belonging to rival groups.
   - Require that certain group leaders be segregated from the general population in order to prevent the spreading of the group

   - Interfere with rehabilitation by reinforcing anti-social values and behavior patterns

4. The problems described above are both aggravated by and aggravate the problems that result from overcrowding.

5. Aryan and white supremacist groups are present in Ohio and within Ohio's prisons. The Aryan Nation group is one of the best-organized and most dangerous white supremacist organizations and has a significant presence in Ohio. Outside the prison, they have been linked to *inter alia*, Peter "Commander Pedro" Langham, Chevie and Chenye Kehoe and the Greathouse organization. Peter Langham headed the group that organized and executed bank robberies across the Midwest. Chevie and Cheyne Kehoe were involved with a shoot out with Ohio law enforcement officers, the murder of an Arkansas gun dealer and the distribution of illegal firearms. The Greathouse organization was a street gang that operated on the south side of Columbus, Ohio and was responsible for numerous acts of violence, including at least one killing.

6. The Aryan Nation organization is one of the most organized of the white supremacist organizations and has a national presence. It is one of the driving intellectual forces in the white supremacist movement. For example, the Aryan Brotherhood street/prison gang uses Aryan Nation ideology as an organizing and unifying credo. Because of that corrections employees often confuse the Aryan Nation and the Aryan Brotherhood.

7. White supremacist STGs have been involved with violent, and sometime fatal, disturbances at various facilities operated by the Ohio Department of Rehabilitation and Correction ("ODRC"). They played a

part in the riot at the Southern Ohio Correctional Facility in 1993, which resulted in 11 deaths. They were involved in the murders of inmates at the Madison and Trumbull Correctional Institutions. They have played central roles in escapes or attempted escapes from the Lebanon, Madison and Mansfield Correctional Institutions. Such groups constitute the largest category of STGs within ODRC's inmate population and the monitoring and suppression of their activities is a high priority of ODRC.

8. White supremacist STGs present particular difficulties because:

   - They cause negative reactions from African-American inmates, Hispanic inmates and inmates belonging to other racial minorities, many of whom belong to rival STGs. Indeed, it has been recognized that violence within an institution increases when white supremacists STGs increase their visibility within that institution.
   - They have strong support from outside of the prison system from groups and individuals who are often themselves involved in illegal activities, as described above.
   - They have higher levels of internal cohesion.
   - Individual members are usually more committed to the group than are members of other types of STGs.
   - Individual members tend to be more sophisticated and hence harder for corrections and law enforcement officials to detect and control.

9. The Church of Jesus Christ Christian ("CJCC") is part of the Christian Identity movement and is closely affiliated with the Aryan Nation group described

above. The mailing address of the national headquarters of the CJCC is the same as the mailing address for the national headquarters of the Aryan Nation. Many of the members of the CJCC are active members of the Aryan Nation. Many Aryan Nation members and local organizations use the teachings of the CJCC as the ideological basis for their activities.

10. Because of those close connections between the CJCC and the Aryan Nation and the demonstrated dangerousness of the Aryan Nation, ODRC closely monitors the contacts between the CJCC and inmates in its custody and the actions of inmates who claim allegiance to the CJCC.

12. One of the most important tools utilized by ODRC to limit STG activity is the suppression of STG "identifiers." Identifiers are non-verbal means by which STG members indicate that they are affiliated with a particular STG. These identifiers consist of, *inter alia*, colors of clothing, tattoos and brands, manner of dress, graffiti, hand signs, hair style and length and certain behavioral patterns. It is important to suppress the use of identifiers in a prison environment because identifiers allow members of antagonistic STGs to identify each other for purposes of violent altercations. The absence of identifiers also makes it more difficult for new transferees to a particular prison to identify potential gang cohorts, a concern that has become more important as inter-prison transfers have increased in frequency. In addition, the suppression of identifiers is important because use of identifiers build unity and cohesiveness among STG members, thereby aggravating the dangers resulting from alternate power structures as described above.

13. STGs will often use literature from outside of prison as an organizing tool because it shows that the group has stature outside of the prison. In addition, the

possession of such literature can be used a form of identifier.

14. The very presence of white supremacist literature, apart from its content, causes problems in prison because it can be used as a STG identifier. Such literature identifies inmates possessing it with white supremacist groups and the views they espouse. Inmates possessing that literature can use it to identify their beliefs to like minded inmates in much the same ways that street gangs use "colors" and other identifiers. Inmates belonging to rival groups are likely to similarly perceive possession of such literature as an identifier, albeit for much less friendly purposes. Because of those facts corrections officials seek to limit the entrance of such literature into prisons apart from its content. Prisons are viewed by white supremacist STG's as particularly fertile recruiting grounds.

15. The materials withheld from inmate John Gerhardt, 269-497, ("Gerhardt") were properly withheld because:

    - Each issue contained certain symbols that are recognized identifiers for the Aryan Nation.

    - The very presence of those publications, aside from their content, could create tension and possibly inspire violence between inmate [sic] of other races.

16. STGs frequently use religion to facilitate and cover their illicit activities. They do so for several reasons. First, inmates who are otherwise separated can come together to attend congregate religious activities, where they can plan and execute the operations of their STG. Second, the legal protections that surround religious activity make it harder for prison staff to regulate or prevent actions purportedly taken for

religious reasons. For example, a STG operating in the District of Columbia's Lorton prison used "religious" activities to facilitate prostitution, drug dealing and the production and distribution of pornography within that prison. See EX. A hereto.

17. White supremacist STGs will often claim religious status or manipulate religion in order to insulate their activities from official action or otherwise further the interests of their groups. Among the ways that they seek to do so are requesting group religious services so that inmates otherwise separated in different parts of a prison may physically come together to further their group activities. In addition, such services can be used as a recruiting tool because they provide a readily available and fairly visible means for prospective members to get in contact with the group. In effect, such services have the potential to become a type of STG identifier. Because of those realities, and other considerations, ODRC will not let such groups hold separate congregate worship services but instead only permits inmates claiming to adherer to a particular faith to attend generic worship services for each of the major faith groups (ie, Islam, Catholicism, Protestant Christianity) within which his specific creed falls, which are attended by other inmates and closely monitored by staff.

Further affiant sayeth naught.

/s/ Matthew Meyer
MATTHEW MEYER

Sworn to before me and subscribed in my presence thi, 16th day of November 1999.

/s/ Karen L. Wolfe
NOTARY PUBLIC

[SEAL]

Karen L. Wolfe
Notary Public, State of Ohio
My Commission Expires
12/27/99

Exhibit A

18TH STORY of Level 1 printed in FULL format.

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The Washington Post

September 27, 1996, Friday, Final Edition

SECTION: A SECTION; Pg. A01

LENGTH: 949 words

HEADLINE: Ring Used Religion as Cover to Sneak Drugs Into Lorton

BYLINE: Charles W. Hall, Washington Post Staff Writer

BODY:

A drug ring posing as a church group smuggled cocaine and prostitutes into the Lorton Correctional Complex and filmed a pornographic video in the prison chapel, using a law protecting religious freedom to avoid scrutiny by guards, officials said yesterday as they announced more than 30 arrests.

Posing as members of the Moorish Science Temple, a religion popular in jails and prisons, the group exploited what officials called a gaping loophole in Lorton's security.

Because of a 1993 federal law protecting religious freedom of prisoners, members were allowed to have private visits with inmates at virtually any hour and were subjected to only minimal searches, officials said. The members also routinely intimidated guards by threatening to sue them, they said.

"We had correctional officers who were afraid to do their jobs," said D.C. Corrections Director Margaret A. Moore, who announced several measures to tighten control of prison visits at a news conference in Alexandria.

U.S. Attorney Helen F. Fahey said she hoped the arrests will warn visitors not to smuggle drugs into Lorton. She emphasized that the crackdown was not intended as an attack on any religious group.

"This case is not an indictment of the Moorish Science Temple," Fahey said. "It is an indictment of individuals who exploited a religious exemption to smuggle drugs."

A. Harvin-Bey, grand sheik of Moorish Science Temple No. 74 in the District, condemned those involved in the alleged crimes at Lorton.

"We don't condone anything like that, and if they are members [of the Moorish Science Temple], then justice should take its course," Harvin-Bey said. "It's sad that anyone would misuse any religious organization. That's not what our teachings promote."

Harvin-Bey said that religion has attracted millions of worshipers across the country. There are about 10 temples in the Washington area, he said. The religion, which is open to all races, focuses on the ancestry of American slave, saying they descended from Moabites who formed the Moorish empire.

A grand jury issued 38 secret indictments Tuesday. About 6 a.m. yesterday, federal agents and local police

officers began arresting suspects. By 6 p.m., seven remained at large, said William Megary, acting special agent in charge of the FBI's Washington field office.

Officials said 21 suspects were from the District, eight from Maryland, two from Virginia and seven had unknown addresses.

All of the defendants were charged with cocaine distribution offenses, and two – Nathaniel Pleasant Bell and Karima Cook, both of Baltimore – also were charged with transporting women across state lines for prostitution.

Federal prosecutors and prison officials said they had suspected for several years that illegal activities were occurring during some religious services. Outsiders seeking to attend religious services in the complex had only to fill out a card, and prison officials did not verify whether they were church members, Moore said.

In addition, according to papers filed yesterday in U.S. District Court in Alexandria, such visitors received numerous exemptions from standard security procedures at the District's 6,000-inmate prison complex in southern Fairfax County.

In January, officials said, a cooperative inmate gave investigators vital access to the drug ring.

Posing as a drug seller in the maximum-security unit, the inmate received drugs brought in by mostly female visitors, many in dresses of the type often worn by Islamic women. The drugs were supplied by an undercover officer posing as a drug seller outside the complex.

Because all of the cocaine ultimately was routed to the cooperating inmate, none actually reached the general inmate population, prosecutors said.

On Jan. 23, Bell and Cook allegedly brought in three women to a schedule religious service in a conference room that was being used as a makeshift chapel. Prison officials earlier had intercepted a phone call between Bell and an inmate making plans to bring in the women, authorities said.

For about 10 minutes, an inmate using a smuggled video camera recorded sex acts between the women and the inmates, according to Timothy J. Shea, an assistant U.S. attorney who helped supervise the investigations. The informant later was able to obtain a copy of the video inside Lorton.

Moore said the prison temporarily will issue no new passes to visitors who say they represent religious groups and will subject all current volunteers to criminal, background checks. In addition, she said, guards will be ordered to constantly monitor services through observation windows and periodically walk through rooms where services are taking place.

Moore said prisons nationally are experiencing problems with the 1993 Religious Freedom and Restoration Act, saying it limits the ability of prison officials to restrict religious activities among inmates.

Todd Craig, a U.S. Bureau of Prisons spokesman, said representatives of religious who visit federal prisons already go through criminal background checks and receive extensive training on rules.

Jonathan Smith, executive director of the D.C. Prisoners Legal Services Project, said that he would closely review any restrictions on religious worship but that he probably would not oppose reasonable security measures.

"Religious activities in prisons are one of the most valuable tools available for an inmate's rehabilitation," Smith said. "If they want to search visitors, I probably would not have a problem. If they say there will be no more religious visitors, we would very likely challenge that in court."

Staff writer Leef Smith contributed to this report.

GRAPHIC: Photo, larry morris, U.S. Attorney Helen P. Fahey announces the indictments at a news conference in Alexandria. Behind her is D.C. Corrections Director Margaret A. Moore.

LANGUAGE: ENGLISH

LOAD-DATE: September 27, 1996

EXHIBIT J

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN WILLIAM GERHARDT III, EDWARD PAUL GERHARDT, Defendants-Appellants.
No. 80-5066, No. 80-5069
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
627 F.2d 1093; 1980 U.S. App. LEXIS 15399

July 25, 1980

NOTICE:

UNPUBLISHED OPINION. Under Rule 11, unpublished opinions cannot be cited to the Sixth Circuit Court of Appeals.

Sixth Circuit Rule 24 Supersedes Rule 11.

COUNSEL: Victor Merullo, 722 South Front Street, Columbus, Ohio 43206 (Ct. appt. – CJA)

Harold Wonnell, 140 E. Town Street, Suite 1260, Columbus, Ohio 43215 (Ct. appt. – CJA) For Appellant

James C. Cissell, United States Attorney, 302 Federal Building, 85 Marconi Boulevard Columbus, Ohio 43215 For Appellee

OPINION:

ORDER

Before: MERRITT, KENNEDY, and MARTIN, Circuit Judges.

This is an appeal from a jury finding that John William Gerhardt III and Edward Paul Gerhardt were guilty of conspiring to violate the civil rights of school children, attempting to place a bomb in an institution receiving federal assistance, and attempting to obstruct justice. The primary proof adduced by the government consisted of tape recorded conversations between appellants and undercover agents which showed that appellants plotted to bomb a school attended by the daughter of U.S. District Judge Robert M. Duncan in order to protest his school desegregation orders.

Appellants argue here, as at trial, that they were members of peaceable white racist organizations the aims of which were "to involve themselves in political elections and to attempt to educate the public on their viewpoints." They allege that their nonviolent strategies were subverted at the insistence of George Giammarino, who they

had hired for "security" and who was a member of the Columbus Police Department.

While the Gerhardts insist that they were without predisposition to commit violent acts, see Hampton v. United States, 425 U.S. 484, 490 (1976); United States v. Jones, 575 F.2d 81 (6th Cir. 1978), there is a great deal of evidence in the record to suggest otherwise. It is therefore without the province of this Court of disturb the jury verdicts, and we decline to do so. See Jackson v. Virginia, 433 U.S. 307 (1979).

Appellants also contend that they were not afforded full discovery as to (a) their recorded conversations and (b) the names of certain government witnesses. However, the record shows that the United States Attorney afforded full access to the recorded materials. Finally, this Court and many others have held the government need not generally provide the identity of its witnesses prior to trial, see United States v. Carter, No. 79-5354 (6th cir., filed May 9, 1980), and the cases cited therein. The facts of this case provide no basis upon which to ignore this rule. See United States v. Trejo-Zambrano, 582 F.2d 460 (9th Cir. 1978).

The judgment of the District Court is affirmed.

EXHIBIT K

AFFIDAVIT OF HORST GIENAPP

County of Franklin :
: ss
State of Ohio :

Now comes Horst E. Gienapp, having been first duly sworn, and states and affirms as follows:

1. I am the Grants Chief of the Ohio Department of Rehabilitation and Correction ("ODRC) and have held that position since April 2, 1995. Among my duties is overseeing ODRC's efforts to obtain federal funding, including the process of applying for such funds and reviewing grant conditions so that ODRC may knowingly accept all conditions that accompany federal funds. As a result of my duties in that position I have personal knowledge of the matters set forth herein.

2. As of September 22, 2000 ODRC had accepted of 27 separate types of federal funds. ODRC received no other federal funds. The amounts and purposes of those funds are described in the document attached as exhibit I hereto.

3. None of the federal funds received by ODRC were specifically related to the religious practices of prisoners in its custody. None of the federal funds received by ODRC were in any way conditioned upon ODRC or its staff taking or refraining from actions that burden prisoners' religious exercise.

4. The total amount of federal funds received by ODRC is $25,545,892. Those funds will be disbursed over several years, which will span several of ODRC's fiscal years. ODRC's budget for the current fiscal year is $1,587,724,137.00.

Further affiant sayeth naught.

/s/ Horst E. Gienapp
Horst E. Gienapp

Sworn to before me and subscribed in my presence this 23rd day of October, 2000.

/s/ [Illegible]
Notary Public

[SEAL]
ROGER WICKS, JR.
Notary Public, State of Ohio
Expires 8/15/02

EXHIBIT L

OHIO DEPARTMENT OF REHABILITATION & CORRECTION DIVISION OF BUSINESS ADMINISTRATION GRANTS SECTION

Federal Grant Descriptions

DEPARTMENT OF JUSTICE:

Intensive Confinement Construction – CFDA # 16.586:

The Ohio Department of Rehabilitation and Correction (ODRC) received a federal grant in 1995 to construct a 125 bed Intensive Confinement Institution in Glouster, Ohio. This program will have a substance abuse treatment component, as well as an emphasis on transition back into the community for treatment continuity. The award is $1,736,164 (Correctional Boot Camp). Construction is underway.

Federal INS Video Teleconferencing Hearing Program CFDA # 16.710

ODRC was awarded this Technology Grant from the Office of Justice Programs (OJP)/ Community Oriented Policing Services (COPS). The videoconferencing system will be used to conduct hearing to confirm the identification and other dispositional matter for illegal and criminal aliens incarcerated at the Correctional Reception Center. Award amount: $62,500.

Reducing Correctional Officer and Family Stress in Ohio through Organizational Interventions – CFDA # 16.560:

ODRC received a grant to implement a comprehensive stress reduction program for correction officers in five Ohio corrections facilities and their families. Program components are: Mentoring for new probationary officers, an alternative dispute resolution program, a family orientation program, an employee family informational services hot line and website and a post-investigation debriefing policy. Current award: $100,000.

Research Reform CFDA # 16.560

The ODRC received funding to provide services of its Bureau of Research to assist in the completion of examining the effects of Ohio's "Truth-in-Sentencing" reforms on inmate institutional behavior. Current award: $117,570.

State Criminal Alien Assistance Program (SCAAP) – CFDA # 16.572:

ODRC receives funds for the costs incurred for the imprisonment of foreign nationals convicted of felonies in of Ohio. These funds in conjunction with prior fiscal year funds, are granted in-house to cover the development of innovative pilot projects, as well as,

conferences and staff training. An example is ODRC's annual gang training. The current award is $1,358,185.

Violent Offender Incarceration/Truth in Sentencing (VOI/TIS) - CFDA # 16.586:

This program is funded through a formula grant based upon violent offenders incarcerated in Ohio and the enactment of Senate Bill 2. The funds are used for construction and renovations at ODRC, DYS and County Jails. Current award: $12,143,169.

OHIO DEPARTMENT OF EDUCATION:

Adult Basic Education - CFDA # 84.002:

The Ohio Department of Education (ODE) program, Adult Basic Education, provides funding for classroom instruction to inmates for adult education classes within institutions and Community Based Correctional Facilities (CBCF). Current award: $829,977.

Title 1- CFDA # 84.013:

These funds support ODRC's school system, (Ohio Central School Systems, OCSS), with supplemental instruction in reading, mathematics and language arts for low functioning adult inmates under the age of 21, and offenders in Community Based Correctional Facilities (CBCF's). The current award: $1,515,357.

Title VI (Formerly Chapter II) - CFDA # 84.298:

The OCSS staff development grant complements the Title I program and supplements education programs in the institutions by providing funding for the cost of workshops and staff development meetings. Current award: $18,858.

Special Education - Unit Allocation (Reimbursement) - 99.999 (No CFDA #):

The ODE program, Special Education, provides reimbursement to ODRC for developmentally handicapped inmates under the age of 21. Utilizing Special Education certified teachers, instructional classes include living skills, reading, and math. The ODE provides reimbursement based on a funding formula for each program year. DRC currently receives $863,672 in reimbursements.

Special Education Supplemental Program - CFDA # 84.027:

The ODE implemented this pass through grant to supplement the Special Education Unit Allocation program which is used to purchase supplies and materials for the special education curriculum. The OCSS currently receives $145,126.

Vocational Education - CFDA # 84.048:

For vocational education ODRC receives pass through federal funds from ODE as well as a specific federal grant (Carl D. Perkins) for the purchase of materials, supplies and equipment. The Carl D. Perkins grant is $224,000 and the pass through unit funds allocation is $1,300,000.

Library Services and Construction Act - CFDA # 84.034 Closed:

Grant funds pass through the (ODE) to the State Library. The program supports libraries within 12 institutions. Funds are used to improve library services to inmates by purchasing library supplies, books and other equipment. FY 1998 was the last year of funding. The FY 1998 grant award totaled $87,930. **This program is closed.**

Adult High School – 99.999 (No CFDA # – Rotary Funds):

The ODE provides reimbursement to ODRC for expenses incurred in the administration of the Adult High School program. Current reimbursement: $93,913.

GED Testing – CFDA # 84.002:

The ODE provides reimbursement to the ODRC for expenses incurred in the administration of a General Development Diploma program. Current reimbursement is $78,176.

Federal School Breakfast – CFDA # 10.553:

The ODE provides reimbursement to the ODRC for meals and/or milk served to incarcerated inmates under 21 years of age. Current reimbursement for this program: $437,131.

Federal School Lunch – CFDA # 10.555:

The ODE provides reimbursement to the ODRC for meals and/or milk served to incarcerated inmates under 21 years of age. Current reimbursement for this program is $777,983.

Incarcerated Youth Offender Program (IYO) – CDFA # 84.331:

This US Department of Education Grant enables the Department to provide sub-grants to colleges and universities for the purpose of providing post secondary employment education skills to eligible ODRC inmates. The current award is $681,294.

Entry Year Program CFDA # 84.084:

The ORDC's school system, OCSS, will use these federal funds to implement a pilot training program to

serve a number of beginning teachers, mentors and "Praxis III" assessors to help-them in their first year as new vocational teachers. The program will be funded for one year at $100,000

OFFICE OF CRIMINAL JUSTICE SERVICES: (pass through federal funds from BYRNE Memorial Program and others from the US Justice Department.)

Offender Job Linkages – CFDA # 16.579:

This program is funded through the Office of Criminal Justice Services and assists the offender in preparing for employment upon release from institutions by assessing employer needs and offender training and preparation. This program is funded on a calendar year basis. Final award is $272,600.

Residential Treatment Programs – CFDA #16-593:

ODRC received four competitive grants from the Office of Criminal Justice Services to provide substance abuse treatment services for the inmates:

1. The Noble Correctional (institution based) program is funded from a the Residential Substance Abuse Treatment Program (RSTAT) for $280,930.

2. Nova House (community based half-way house component in Dayton, Ohio) (RSTAT) for $337,324.

CFDA # 16.579:

3. ODRC received two grants and is sub-granting two projects to Wright State University. The prison project is called "Institution Alcohol and other Drugs (AOD) Case Management" and the current sub-grant is for $480,093.

4. The community based program is called "Community AOD Case Management for $415,970.

OHIO ATTORNEY GENERAL:

Victim Information and Notification Everyday (VINE) – CFDA # 16.575:

Vine is a service that provides incoming call services for crime victims within a specific county. Victims of crime are able to contact this service to receive basic information about a defendant held in custody. Funding for this program is provided through the Ohio Attorney General's Office in the amount of $134,700.

U.S. SOCIAL SECURITY ADMINISTRATION (SSA) – 99.999 (No CFDA#:

Incentive Payment Memorandum of Understanding (IPMOU)

This is an agreement between ODRC and the Social Security Administration. The purpose of the agreement is that the Department provides SSA with information on inmates when they enter our system so the SSA can make determinations regarding SSE or RSDI benefits. SSA reimburses ODRC for our staff time in providing this information. To date we have received $41,200 in our Federal Fund account (323). The Department does not intend to spend these funds and in the near future move them to a, General Revenue Account and reimburse the general fund.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

John Miller, et al., Plaintiffs,	:	Case No.: C2-98-275
v.	:	JUDGE SARGUS
Reginald Wilkinson, et al., Defendants,	:	MAGISTRATE JUDGE KEMP
John Gerhardt, Plaintiff,	:	CLASS ACTION
v.	:	Case No.: C2-95-517
Alan Lazaroff, Warden, et al., Defendants.	:	MAGISTRATE JUDGE KEMP

PLAINTIFF'S JOINT REPLY TO DEFENDANTS' CONSOLIDATED PARTIAL MOTIONS TO DISMISS

[Exhibits]

* * *

PLAINTIFFS' APPENDIX A

AFFIDAVIT OF CHARLES MONTGOMERY

STATE OF ARIZONA	:	
	:	SS
COUNTY OF MARICOPA	:	

I, Charles M. Montgomery, after being sworn, give the following affidavit under oath:

1. I have been employed in the field of corrections for more than 37 years. During that time I have worked

at a number of Federal, State, and Commonwealth prison/jail facilities. My work resume is attached to this affidavit.

2. My duties have included the direction and oversight of institution operations and procedures which are related to custody, security and control as well as a number of programs and services including religious services.

3. My job assignments have included a number of progressively responsible positions from line staff Correctional Officer to Warden at the institutional level, to Branch Chief, Division Manager and Director of Institution Operations at the Central Office level.

4. I retired from the Federal Prison System on August 1, 1987 and since that time I have worked as an independent consultant in a number of city, county, and state jurisdictions including the Commonwealth of Puerto Rico.

5. During my 37 years as a correctional/penal practitioner it has been my experience that security issues are seldom raised by inmate participation and/or the accommodation of religious practices and services, per se, and when they are they can and should be handled on a case by case basis.

6. It has also been my experience that prison officials may be inclined to attempt to limit the number of inmate programs and services, including religious activities, as a matter of administrative convenience as the result of the availability/existing resources. Thus, they can be inclined to limit and/or combine a number of religious and/or program activities for no more reason than they would consider double bunking cells even when said practice flies in the face of institution security and objective inmate classification.

7. It is my professional opinion that inmates who are legitimately engaged in religious activities they sincerely hold to be true are less likely to commit serious disciplinary infractions than those who are less involved in their own religious activities.

8. Religious exercise gives inmates the opportunity to maintain their feelings of self worth and self identity and it can provide individuals with the opportunity to bond with others who share the same belief. It can also provide them with the opportunity to measure their beliefs and conduct to universal standards of good behavior.

9. I believe that inmates who express sincere religious convictions and are able to practice said beliefs have a greater likelihood of rehabilitation and reform as well as a diminished likelihood of recidivism. I believe this is true of all religions, not just contemporary or mainstream religions.

10. Finally, it is my professional opinion that inmates who feel they have not been provided with reasonable opportunities to practice their sincerely held religious beliefs will result in a much higher rate of incident reports than those who have not been subjected to said disparate treatment.

Further, the Affiant, sayeth naught.

/s/ Charles M. Montgomery
Charles M. Montgomery

Sworn to before me and subscribed in my presence this 21st day of February 2001,

/s/ JM Hannah
Notary Public

OFFICIAL SEAL
J.M. HANNAH
[SEAL] Notary Public – State of Arizona
MARICOPA COUNTY
My Comm. Expires May 10, 2003

Charles M. Montgomery, Jr.

D.O.B. 7/5/37 12/19/98

Overview: Beginning with post retirement from Federal BOP

Dates: August 1, 1987 through present (Inverse Order)

Duties Capacity: Case: Location: Subject/Yr.:

21. Consultant, Daughtry v. New York City, Inmate Assault, 98
20. Consultant, Weeks v. Montana – Staff Assault by Inmate, 98
19. Consultant, Eakins v. Chaffee (Calif.) – Use of Force, 98
18. Consultant, Krausch M. v. Arizona –Improper Strip Search, 98
17. Expert Assistance, Coiner v. U.S. – Witness Protection, 97
16. Consultant, Krausch P. v. Arizona – Protective Custody, 97
15. Consultant, Sheppard v. Phoenix (II), NYC – Excessive Force, 97
14. Consultant, Davis v. City of Greenville, MS. – Malfeasance, 96
13. Consultant, Illick v. Miller, Ely, Nevada – Use of Force, 96
12. Consultant, Maine v. Oklahoma, Employee – Rape/Civil Rights, 96
11. Court Expert, Settle v. Savage, AZ – Protective Custody, 96
10. Consultant, Sheppard v. Phoenix, NYC – Execssive Force, 95
9. Consultant, McMullen v. Harris County, TX – Jail Assault, 95
8. Consultant, Rosa Myhre v. Montana – Wrongful Death, 94
7. Consult. Morales-Feleciano v. Colon, PR – Total Conditions, 6 yrs
6. Consult. for the National Institute of Corrections – Umgt., 87

5. Consult. for the State of South Dakota – Unit Management, 87
4. Expert Witness, Small v. Martin, NC – Overcrowding, 87
3. Consultant for the State of MS – Classification/Umgt., 87
2. Contract Instructor, NAC, Boulder, CO – Inmate Classification, 87
1. Interagency Loan (Warden) Guthrie v. Evans, GA – Total Cond., 2 yrs

Court Testimony: 4, 7, & 10. Depositions: 10, 11, 12, 13, 15, 19 Case Settled: 8, 9, 11, 12, 13, 14
Grand Jury: 1

Position: Lead Consultant and Member of the Commonwealth's Special Management Team for the Rio Piedras Prison Complex, San Juan, Puerto Rico.

Dates: August 1, 1992 to July 16, 1993

Duties: As per government stipulation, in the Morales-Feleciano Case, operational authority at the State Penitentiary/Jail; i.e., the "Rio Piedras Prison Project" was vested in a special management team to serve as "advisors". Said special management team was supervised by the Honorable Ramon Garcia Santiago first, while he was serving as the Governor's personal representative and finally, while he was under a personal services contract (following his retirement as Secretary of State).

Position: Interim Director, Institution Operations (New Division)

Dates: October 15, 1989 to August 1, 1992

Duties: Served as the first director for one of five primary divisions within the Administration of Corrections (AOC) for the Commonwealth of Puerto Rico, on an interim basis. The

operations division consisted of (7) major components within the agency and was responsible for providing technical advice and oversight responsibility for thirty or more facilities in the areas of Security, Social Work, Inmate Grievances, Food Service, Education, Religion, and Compliance efforts in the Morales-Feliciano Case.

Position: Division Manager
Federal Prison Industries
320 First St. N.W.
Washington, D.C. 20534

Dates: November 1985 – July 1987

Duties: As the "first" Division Manager for UNICOR Distribution Centers, I was responsible for everything from teasing out the idea of establishing Distribution Centers (across the country) to the development of day to day procedures by which the concept was initiated (including staff analyses). Distribution Centers were established for the purpose of increasing sales and customer satisfaction by providing quick delivery (14 days or less) on select quantities of UNICOR's most popular products. UNICOR sold more than $250 million worth of products to other government agencies during FY-87.

Position: Chief of Unit Management
Federal Bureau of Prisons
320 First Street N.W.
Washington, D.C. 20534

Dates: September 1983 – November 1985

Duties: (Position reactivated following GAO Audit). As the first Chief of Unit Management in a number of years, I was given functional

responsibility for revitalizing Unit Management in the Federal Prison System. I clarified agency standards and rewrote policy and procedures which included staffing guidelines. I participated in numerous audits and training seminars and had a direct influence on more than 200 Unit Managers, 300 Case Managers and 400 Counselors throughout the Federal Prison System.

Position: Associate Warden – Security/Programs
Federal Correctional Institution
Petersburg, VA. 23804-1000

Dates: July 1982 – September 1983

After completing a two year interagency loan as Warden at Georgia State Prison, I was transferred to Petersburg, Virginia which had been designated to handle the more difficult Youth Corrections Act (YCA) offenders in the Federal Prison System. I conducted a comprehensive security post analysis and oversaw the development and implementation of a Special Management Unit (SMU) for those inmates who had demonstrated they could not live in the general population. I also developed a comprehensive tracking system by which the need for programs and services were taken into consideration and monitored.

Position: Warden
Georgia State Prison
Reidsville, GA. 30399

Dates: July 1980 – July 1982

Duties: In addition to carrying out the traditional duties as Chief Executive Officer for the state's largest maximum security prison; i.e., overseeing the orderly running of an 8,000

acre farm operation, beef herd, swine herd, dairy herd, cannery, sawmill and providing inmates for a number of work details (across the state); I was responsible for for bringing the facility into the 1980's insofar as professional custody, security and control practices and procedures were concerned. Major emphasis was placed on achieving compliance with numerous federal court orders that were the result of years of litigation (Guthrie vs Evans). Initially intended to be a one year assignment, it was subsequently extended a second year because the problems were so varied and complex. In my final report to Governor George Busbee, Chief Judge Anthony Alaimo and Commissioner David Evans, I made more than two dozen recommendations that were adopted including procedures whereby the State would assume full control and responsibility over Georgia State Prison. In hindsight, this was the most challenging and rewarding assignment of my first 25 years in corrections. During my tenure I personally conducted and oversaw the completion of a comprehensive security staff analysis for this facility. Reidsville was the first and only penitentiary that I am aware of which utilized a complete (unadulterated) version of functional unit management!

Position: Superintendent
Federal Prison Camp
Safford, AZ. 85546

Dates: January 1978 – June 1980

Duties: As the Chief Executive Officer for FPC Safford, I was responsible for seeing that all

policies and procedures were carried out in accordance with agency standards. Prior to my departure I made numerous recommendations which resulted in significant changes at FPC Safford (Structural and Staffing). Safford was the first Federal Prison Camp to adopt Unit Management and it was the only prison *camp* to implement a full-fledged Industrial Unit.

Position: Director, Community Treatment Complex
1950 Trumbull Avenue
Detroit, MI. 48216

Dates: January 1976 – January 1978

Duties: Chief Executive Officer for two federal halfway houses in the downtown Detroit area. Major emphasis was placed on inmates obtaining gainful employment, establishing a firm release address/plans, accumulation of release monies (savings) and participation in a variety of individual and/or group interactions with staff including resume writing, management of money, problem solving techniques, interpersonal communications, AA, and drug aftercare programs. Utilized a very structured "leveling program". Average length of stay was ninety days. This program, in conjunction with the proper utilization of existing staff resources, resulted in the highest "success rate" of any federal halfway house in the country (93.7%) as determined by independent research.

Position: Executive Assistant (to the Warden)
Federal Correctional Institution
Lompoc, CA. 93436

Dates: October 1974 – January 1976

Duties: Worked directly for the Warden & performed those duties he deemed appropriate. Had functional responsibility for establishing Unit Management at one of the largest facilities in the Federal Prison System (Eight units inside the institution and two units at the adjacent camp). I was nominated to receive the agency's *Alexander Award* in 1995. This award is presented to the outstanding supervisory employee of the year throughout the FPS.

Position: Unit Manager
Federal Correctional Institution
Seagoville, TX. 75159

Dates: April 1973 – October 1974

Duties: As the Administrative Head for one of five functional units, I was responsible for a caseload of approximately 125 inmates and a unit staff of one case management specialist, three correctional counselors, one unit secretary and three correctional officers. Utilizing a "progressive privilege" unit modality "Unit Six" was subsequently designated as one of several *exemplary units* which were utilized to train unit managers throughout the Federal Prison System.

Position: Senior Instructor
Staff Training Center
523 McDonough Blvd.
Atlanta, GA. 30315

Dates: February 1972 – April 1973

Duties: One of 5 instructors who were responsible for developing and presenting course materials at one of two national training centers for the Federal Bureau of Prisons. I was personally

responsible for the development of a training manual and program for the Bureau's first Correctional Counseling Program. This program was subsequently retitled "Basic Interpersonal Communication" and became a model IPC training program across the country. I also provided technical staff assistance to a number of States during my tenure at the Staff Training Center.

Position: Training Officer
Federal Correctional Institution
Lompoc, CA. 93436

Dates: June 1971 – February 1972

Duties: I had responsibility for the development & implementation of a comprehensive employee development/training program at FCI Lompoc. Essentially, I was the agency's first formal Institution Training Coordinator. Primary emphasis was placed on training received by line staff correctional officers. I also coordinated the effort to identify, schedule and provide speciality training for other disciplines. I was the first BOP employee to be certified as a Master Trainer in Human Resource Development and Life Skills Acquisition by Dr. Robert R. Carkhuff at AIC in Springfield, Massachusetts.

Position: Assistant Personnel Officer
Federal Correctional Institution
Lompoc, CA. 93436

Dates: October 1969 – June 1971

Duties: Performed myriad of duties which are associated with personnel actions; e.g., staff recruitment and paperwork. Coordinated facility's performance appraisal and incentive awards

programs. Began the development of a comprehensive inservice training program for all new hires at FCI Lompoc with special emphasis on probationary C.O.'s

Position(s): (1) Correctional Officer
(2) Senior Officer
(3) Liaison Officer (Counselor)

FCI Lompoc, CA. 93436

Dates: August 1964 – October 1969

Duties: Performed a variety of duties on dozens of progressively responsible security posts on a rotating basis. Primary focus was placed on custody, security, control and the supervision & counseling of inmates on an as needed basis.

As a Correctional Counselor I had an assigned caseload for which I kept track of work and quarters reports, and the maintenance of visiting and correspondence lists, preparation of reclassification materials and provided recommendations in regard to release, work, custody and housing assignments.

PLAINTIFF'S APPENDIX B

OH ST S 5120.132
R.C. § 5120.132

BALDWIN'S OHIO REVISED CODE ANNOTATED TITLE LI. PUBLIC WELFARE CHAPTER 5120. DEPARTMENT OF REHABILITATION AND CORRECTION

GENERAL PROVISIONS

5120.132 PRISONER PROGRAMS FUND

(A) There is hereby created in the state treasury the prisoner programs fund. The director of rehabilitation and correction shall deposit in the fund all moneys received by the department from commissions on telephone systems established for the use of prisoners. The money in the fund shall be used only to pay for the costs of the following:

(1) The purchase of material, supplies, and equipment used in any library program, educational program, religious program, recreational program, or pre-release program operated by the department for the benefit of prisoners;

(2) The construction, alteration, repair, or reconstruction of buildings and structures owned by the department for use in any library program, educational program, religious program, recreational program, or pre-release program operated by the department for the benefit of prisoners;

(3) The payment of salary, wages, and other compensation to employees of the department who are employed in any library program, educational program, religious program, recreational program, or pre-release program operated by the department for the benefit of prisoners;

(4) The compensation to vendors that contract with the department for the provision of services for the benefit of prisoners in any library program, educational program, religious program, recreational program, or pre-release program operated by the department;

(5) The payment of prisoner release payments in an appropriate amount as determined pursuant to rule;

(6) The purchase of other goods and the payment of other services that are determined, in the discretion of the director, to be goods and services that may provide additional benefit to prisoners.

(B) The director shall establish rules for the operation of the prisoner programs fund.

PLAINTIFF'S APPENDIX C

State of Ohio

: ss

County of Warren

Now comes affiant, Alfar Kynwulf (also known as Darryl Blankenship), and being duly cautioned as to the penalty of perjury does hereby depose and say:

1. That I have personal knowledge of the facts stated herein and I am competent to testify to same.

2. That I am a Plaintiff in the matter of *John Miller, et al, v. Reginald Wilkinson, et al.*, Case no. C2-98-275, United States District Court, Southern District of Ohio, Eastern Division.

3. That I am an adherent to the ancient Nordic/Teutonic religion of Asatru.

4. The Ohio Department of Rehabilitation and Corrections has banned from their state prisons various books pertaining to the Asatru religion. These banned books would include, but are not limited to, the following:

a. *The Well of Remembrance* by John Metzner. This book deals with the mythology and cultures of stone-age and bronze-age Europe and Asia. While this book espouses no racist nor political views, it has been banned from Ohio prisons by the Publication Screening Committee as being "racist" and "white supremacist".

b. *Runelore* by Edred Thorsson. This book deals with the history and mythology of the ancient Germanic alphabet known as runes which are considered to be mystical and magical aides within the Asatru religion. While this book espouses no racist nor political views, it has been banned from Ohio prisons by the Publication Screening Committee as being "racist" and "white supremacist".

5. Both books referred to above in paragraph number 4 are religious in nature, and are published outside the state of Ohio and can be obtained only through interstate commerce.

6. I have requested to purchase and possess the following religious items in connection with the practice of the Asatru religion. These religious items are produced and distributed from outside the state of Ohio and can be obtained only through interstate commerce:

a.) *Wooden ritual bowls* (known as Blotbolli). While I am not permitted to purchase or possess a wooden ritual bowl, this prohibition does not apply to adherents of the Wicca religion.

b.) A *sacrificial evergreen twig* or representation thereof (known as Hlauttein).

c.) An *altar or oath ring* (known as stallahringr).

d.) *Statuettes of gods or goddesses.*

e.) A *ritual drinking horn* (known as drekkjarhorn).

f.) A *ritual runic wand* (known as Gandr). While I am not permitted to purchase or possess a runic wand, this prohibition does not apply to adherents of the Wicca religion. In addition, inmates associated with the Music association are permitted to possess drum sticks, which are the equivalent of larger and heavier runic wands, twice the size and weight of the wand I request to possess.

g.) *Wooden runes*. While I am not permitted to purchase or possess wooden runes, inmates are permitted to purchase and possess Domino game pieces. Domino game pieces are nearly identical to runes, with the exception being that Domino's are inscribed with (dots, while runes are inscribed with lines (said lines making up the ancient Germanic runic alphabet).

h.) An *Alter cloth*. While I am not permitted to purchase or possess an altar cloth, this prohibition does not apply to adherents of the Wicca religion.

i.) A *Valknot medallion*.

7. The Defendants in the matter of *Miller, et al., v. Wilkinson, et al,* have refused to allow me to purchase or possess all the religious items referred to in paragraph 6 above. In fact, the defendants have banned all Asatru religious items from Ohio prisons, and will not allow same to be purchased or possessed with the exception of a *Thor's Hammer medallion* and *paper rune cards.*

8. Under the penalty of perjury and pursuant to 28 U.S.C. section 1746, I hereby certify the foregoing to be true and correct. Executed on this 13th day of February, 2001.

Respectfully submitted,

/s/ Alfar Kynwulf/Darryl Blankenship
Alfar Kynwulf, a.k.a.
Darryl Blankenship #295-771
Warren Corr. Inst. – 2C 137
P.O. Box 120
Lebanon, Ohio 45036

PLAINTIFF'S APPENDIX D

Notice of Withholding Printed Material Pursuant to AR 5120-9-19

Institution: Warren Correctional	Date: 10-17-00
Inmate Name: Miller	Inmate Number: 199-891

The printed material being excluded is the following:
Runelore

Pursuant to Administrative Regulation 5120-9-19, the printed material listed above and addressed to you is

being excluded from the institution because it has been deemed to be detrimental to, or to pose a threat to: the rehabilitation of inmates; the security of the institution; or, the good order or discipline of the institution. Specifically, it was determined that this material:

☐ C1 Facilitates, encourages, incites, promotes, or instructs in, criminal activity such as rioting or illegal drug use.

☐ C2 Depicts, encourages, incites, or describes activities which may lead to, the use of physical violence against others.

☐ C3 Depicts, describes the procedures for, or instructs in the making, using or concealing of weapons.

☐ C4 Depicts, encourages, or describes methods of escape, such as instruction in picking locks or digging tunnels.

☐ C5 Appears to be written in cipher or code, or that instructs in the use of cipher or code.

☐ C6a Is sexually explicit in that it depicts or graphically describes genitalia in a state of arousal, such as a male erection, or exposure of the clitoris.

☐ C6b Is sexually explicit in that it depicts or graphically describes homosexual, heterosexual, or auto erotic sex acts including, but not to be limited to: fellatio, cunnilingus, masturbation, ejaculation, anal or vaginal sexual intercourse of penetration, or manual stimulation of genitalia.

☐ C6c Is sexually explicit in that it depicts or graphically describes sexual activity involving children.

☐ C6d I sexually explicit in that it depicts or graphically describes sexual activity involving sadism, sadomasochism, bondage, or bestiality, or excretory functions.

☐ C6e Is sexually explicit in that it depicts or graphically describes sexual activity which involves and unwilling participant or in which a participant is the subject of coercion.

☐ C6f Is sexually explicit in that it depicts or graphically describes encourages, promotes, or incites homosexual activity in the institution.

☒ **Other** (state concisely): White Supermist[sic]/Racial

Specific example, or citation from the printed material:

Song or Page #	Example or citation (quote or described the depiction)
_____	White Supermist/pose a threat to the rehabilitation
_____	of inmate: the security of the institute

Warden or Designee:	Date:
Quincy Daniels/Mail Room Supervisor	10-17-00

To request review of this decision by central office publication screening committee, you must return this form to the warden or designee within 15 days of the date of this notice. Failure to exercise one of the options below will be construed as acceptance of this decision and forfeiture of the printed material. In such a case material will be destroyed 15 days after the date of this notice.

Please select one of the following options:

☒ I request review by the central office publication screening committee

☐ I would like to mail the material to _____ at my expense.

☐ Please destroy this material

Inmate Signature:	Inmate Number:	Date:
/s/ [Illegible] Miller	199-891	10-17-00

[LOGO] **Ohio Department of Rehabilitation and Correction**

[Names and Addresses Omitted In Printing]

To: Warden, WCI

From: Publication Screening Committee

Subject: *Publication:* RUNELORE
Publication Date: 1987
Inmate: MILLER
Inmate Number: A199-891
Type of Item: Printed Material

Date: Dec 28, 2000

PSC Reference Number: 3805

Pursuant to Administrative Regulation 5120-9-19, the Central Office Publication Screening Committee has reviewed the decision to withhold the above referenced material. Upon review, the Committee found the material to be detrimental to the rehabilitation of inmates, the security, good order, or discipline of the institution as defined by Administrative Regulation 5120-9-19(C)(6). The decision to Withhold the material was properly issued and the material shall therefore be EXCLUDED from the institution.

The printed material shall be returned to the institution for disposition pursuant to Administrative Rule 5120-9-19(M).

Notice of Withholding Printed Material Pursuant to AR 5120-9-19

Institution:	Date:
Warren Correction	1-19-01
Inmate Name:	**Inmate Number:**
Miller	199-891

The printed material being excluded is the following:
Runelore The Well of Remembrance

Pursuant to Administrative Regulation 5120-9-19, the printed material listed above and addressed to you is being excluded from the institution because it has been deemed to be detrimental to, or to pose a threat to: the rehabilitation of inmates; the security of the institution; or, the good order or discipline of the institution. Specifically, it was determined that this material:

☐ C1 Facilitates, encourages, incites, promotes, or instructs in, criminal activity such as rioting or illegal drug use.

☐ C2 Depicts, encourages, incites, or describes activities which may lead to, the use of physical violence against others.

☐ C3 Depicts, describes the procedures for, or instructs in the making, using or concealing of weapons.

☐ C4 Depicts, encourages, or describes methods of escape, such as instruction in picking locks or digging tunnels.

☐ C5 Appears to be written in cipher or code, or that instructs in the use of cipher or code.

☐ C6a Is sexually explicit in that it depicts or graphically describes genitalia in a state of arousal, such as a male erection, or exposure of the clitoris.

☐ C6b Is sexually explicit in that it depicts or graphically describes homosexual, heterosexual, or auto erotic sex acts including, but not to be limited to: fellatio, cunnilingus, masturbation, ejaculation, anal or vaginal sexual intercourse of penetration, or manual stimulation of genitalia.

☐ C6c Is sexually explicit in that it depicts or graphically describes sexual activity involving children.

☐ C6d Is sexually explicit in that it depicts or graphically describes sexual activity involving sadism, sadomasochism, bondage, or bestiality, or excretory functions.

☐ C6e Is sexually explicit in that it depicts or graphically describes sexual activity which involves and unwilling participant or in which a participant is the subject of coercion.

☐ C6f Is sexually explicit in that it depicts or graphically describes encourages, promotes, or incites homosexual activity in the institution.

☐ **Other** (state concisely): _____

Specific example, or citation from the printed material:

Song or Page #	Example or citation (quote or described the depiction)
_____	Racist
_____	Pose a threat to the rehabilitation of inmate

Warden or Designee:	Date:
Sgt. Quincy Daniels/Mailroom Supervisor	1-19-01

To request review of this decision by central office publication screening committee, you must return this form to the warden or designee within 15 days of the date of this notice. Failure to exercise one of the options below will be construed as acceptance of this decision and forfeiture of the printed material. In such a case material will be destroyed 15 days after the date of this notice.

Please select one of the following options:

☐ I request review by the central office publication screening committee

☒ I would like to mail the material to David Goldburger Lawyer at my expense.

☐ Please destroy this material

Inmate Signature:	Inmate Number:	Date:
/s/ [Illegible] Miller	199-891	1-19-01

PLAINTIFFS' APPENDIX E

AFFIDAVIT OF SIMON SCHATZ

State of Ohio

:ss

County of Warren

Now comes affiant, Simon Schatz, who first being duly cautioned as to the penalty of perjury does hereby depose and state:

1. That I have personal knowledge of the facts stated herein and I am competent to testify to same.

2. That I am an Ohio inmate incarcerated within the Warren Correctional Institution at Lebanon, Ohio, under

the jurisdiction of the Ohio Department of Rehabilitation and Corrections.

3. That I am an adherent of the ancient Nordic/Teutonic religion known as Asatru, and that I am a class action Plaintiff in the matter of *John Miller, et al., v. Reginald Wilkinson, et al.,* Case no. 02-98-275, United States District Court, Southern District of Ohio, Eastern Division.

4. That it is traditional for adherents to the Asatru religion to wear a Thor's Hammer religious medallion as a sign of their faith.

5. Thor Hammer medallions are produced and sold by persons or companies outside of Ohio. The most popular being World Tree Publishing, P. O. Box 961, Payson, Arizona 85547, and Runa-Raven, P. O. Box 557, Smithville, Texas 78957. As such, Thor's Hammer religious medallions are purchased through interstate commerce.

6. That I have requested permission from the Ohio Department of Rehabilitation and Corrections to purchase a Thor's Hammer medallion. The Ohio Department of Rehabilitation and Corrections has refused to permit me to purchase a Thor's Hammer religious medallion.

7. That I have filed a grievance concerning the fact that I am denied the opportunity to purchase a Thor's Hammer medallion. My grievance was assigned reference number 11-00-12. The decision to deny me the opportunity to purchase a Thor's Hammer medallion was upheld and affirmed pursuant to the disposition of my grievance.

8. That pursuant to 28 U.S.C. section 1746, I hereby certify under the penalty of perjury that the foregoing is true and correct. Executed on this 16th day of February, 2001.

Respectfully,

/s/ Simon Schatz 267525
Simon Schatz 267-525
Warren Correctional
Institution
P. O. Box 120
Lebanon, Ohio 45036
Affiant

DISPOSITION OF GRIEVANCE

CODE:I-G-4
RESOLUTION:II-B-5
INSTITUTION:W.C.I.

INMATE: Schatz
NUMBER: A267-525

GRIEVANCE NUMBER:11-00-12

2D-153

DATE:11/27/00

Your grievance, filed on 11/14/00, has been reviewed and disposed of as follows:

___ 1. The grievance has been returned because you did not attempt to resolve your problem by contacting ___, who is able to discuss the problem with you. Once you comply with the procedure, you may file a new grievance if not satisfied with the result.

___ 2. The disposition of this grievance will be delayed longer than ten working days for the following reason(s):

___ 3. The disposition of this grievance will be delayed longer than 15 working days and you are requested to approve this extension. DO/DO NOT APPROVE

In your grievance you allege discrimination by Chaplain Van Scoter at WCI. You state the Chaplain has discriminated against you by refusing to allow you to purchase a religious medallion, i.e. "Thors Hammer", even though you adhere to the "Asatru" religion.

Remedy requested: Permit you to purchase the "Thors Hammer" religious medallion.

I have reviewed your file and ICR response from Chaplain Van Scoter. As stated by Chaplain Van Scoter, the "Asatru" lawsuit is still in, the courts. The only individuals permitted to possess the "Thors Hammer" medallion are listed in the lawsuit and you are not on that list. To my knowledge, two inmates at WCI have received permission, per Dr. Schwarz, to possess the "Thors Hammer" medallion, neither of which are you.

Based on the above, I believe your grievance and remedy requested are without merit. Until the lawsuit is settled, you may not purchase or possess the above-mentioned religious medallion. This office will take no further action concerning this matter.

If you wish, you may appeal this decision to the Chief Inspector within five working days from receipt of this disposition. Appeal forms are available in the office of the Inspector of Institutional Services.

Mr. J.C. DeHart /s/ JC DeHart
Inspector of Institutional Services

PLAINTIFFS' APPENDIX F

State of Ohio §
§ ss
County of Ross §

The undersigned, being first duly cautioned according to Law, does hereby state and depose as follows:

1). I have personal knowledge of and am competent to testify to all matters addressed herein, and:

2). I am one of two (2) Plaintiffs in the Case of LEE v. Wilkinson, Southern District of Ohio Eastern Division Case Number C2-97-382, and I am a member of the Wiccan Religion, and:

3). I had attempted to obtain, through purchase or other means, access to many different religious printed materials of, and relating to, Wicca, while incarcerated in the Pickaway Correctional Institution through the years of 1995 – 1998. Some of these titles are listed as follows:

Wicca – The Ancient Way
The Magician's Workbook Of Witches
The Ritual Book of Magic
Samuel Weiser catalog 1996
Serpent's Occult Bookstore catalog
The Magic of food: Legends, Lore and Spells
Earth Power – Techniques of Natural Magic
Buckland's Complete book of Witchcraft
Cunningham's Encyclopedia of Crystal, Gem and Metal Magic
Cunningham's Encyclopedia of Magical Herbs
Pragmatic Magic: Grimoire of Modern Society.
Basic Magic: A Practical Guide
Secrets of *Shamanism*
The Wicca Spellbook

Magical Rites from the Crystal well
Modern Witchcraft Spellbook

and:

4). Each of these publications is religious in nature, and:

5). To the best of my knowledge, each of these is published outside of the State of Ohio, and may only be obtained through interstate commerce, and:

6). Various and sundry Defendants in LEE, et al., v. Wilkinson, et al., Case Number C2-97-?82, have refused to allow me to personally purchase, or otherwise obtain access to, each of the publications listed above, and:

7). I have also attempted to obtain permission to purchase or otherwise obtain access to materials with which to practice Wicca, while incarcerated in the Pickaway Correctional Institution through the years of 1995 – 1998. Some of these items are listed as follow:

A Pentacle
Salt
Quartz Crystals
A Wooden Wand
Incense and/or scented oils
Herbal Teas
Rune Stones
Thread, string, cord or twine
Herbal "tobaccos"
A Pentacle Ring

and:

8). These items are produced and sold by persons outside the State of Ohio, and may only be obtained through use of interstate commerce, and:

9). Various and sundry Defendants in LEE, et al., v. Wilkinson, et al., Case Number C2-97-382, have refused to grant me permission to personally purchase, or otherwise obtain possession and or use of, each of the items listed in paragraph 7, above.

Further deponent saith naught.

Pursuant to 28 U.S.C.A. §1746, I declare and affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, this 11th day of February, 2001.

[Illegible]
LEE – a.k.a. Inmate hampton

Plaintiffs' Appendix G

Inter-office Communication

Date: August 6, 1996

To:

From: Rev. Charles Griffin, Chaplain

Re: Sabbath Meals, and Candles

In a lengthy meeting with Dr. David Schwarz, Administrator of Religious Services, on August 5, 1998, all your requests were discussed. We were reminded that the Ohio Department of Rehabilitation and Correction made an exception in your situation in allowing the Kosher meals even though the House of Yahweh is not a mainstream religion. We were told that meals should not be taken back to the unit now that the kitchen microwave is working properly. This regulation in no way "violates", as you say, the "original agreement", with or without your consent.

The Religious Services Department has granted the permission for the Kosher meals, but you must abide by the norms and regulations of the Food Service Department as to the acquiring of the meals. The releasing of any inmate after 9:15 PM lockdown for purposes of cooking a meal violates security regulations and is certainly out of the realm of the Religious Services Department.

Inmates are not permitted to have candles in their possession. The former Jewish inmate you refer to had candles sent to the Chaplain by his sister. These were used only on the Jewish Festival of Chanukah (Hanukkah), by special arrangement. In no way can candles be made available, and certainly not for use every Sabbath.

I truly regret that the House of Yahweh is not a mainstream religion because that would help us to come to a more agreeable resolution of some of your requests.

/s/ Father Griffin, Chaplain
Rev. Charles Griffin, Chaplain
Ross Correctional Institution

RELIGIOUS SERVICES, RCI.

cc: Judy Hill, Food Service Supervisor
Mike Randle, Deputy Warden, Administration
Capt. Danny Payne, 2nd Shift Commander

[Portions of this document were redacted to protect privacy of inmate recipient of this document]

PLAINTIFFS' APPENDIX H

WICCA

The Ancient Way

Janus-Mithras
Nuit-Hilaria
and
Mer-Amun

Published by:
IllumiNet Press
Division of I-Net Group, Ltd.
P.O. Box 2808
Lilburn, GA 30226

10987654321

Printed in the United States of America
Isis Urania Covens
Suite 100-481
2 Blaor Street West
Toronto, Ontario
Canada M4W 3E2

Runelore
A Handbook of
Esoteric Runology

Edred Thorsson

SAMUEL WEISER, INC.
York Beach, Maine

The Well of
Remembrance

Rediscovering the Earth Wisdom
Myths of Northern Europe

RALPH METZNER

with contributions by
BARBEL KREIDT
NORBERT MAYER
CHRISTIAN RÄTSCH

Foreword by
MARIJA GIMBUTAS

Shambhala • Boston & London • 1994

---

of WITCHES

CELEBRATING THE GODDESS
AS A SOLITARY PAGAN

JANET THOMPSON

SAMUEL WEISER, INC.
York Beach, Maine

THE

BOOK OF BLACK MAGIC
INCLUDING THE RITES AND MYSTERIES
OF GOËTIC THEURGY, SORCERY, AND
INFERNAL NECROMANCY

BY

ARTHUR EDWARD WAITE
AUTHOR OF "DEVIL-WORSHIP IN
FRANCE", ETC., ETC.

WITH ILLUSTRATIONS

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York Beach, Maine

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WORKBOOK

A MODERN GRIMOIRE

STEVE SAVEDOW

SAMUEL WEISER, INC.
York Beach, Maine

RITUAL BOOK OF MAGIC

Compiled and Edited by

Clifford Bias

First published in 1981 by
Samuel Weiser, Inc.
P.O. Box 612
York Beach, Maine 03910

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New York, N.Y. 10003

TO OPEN THE BLIND EYES, TO BRING OUT THE PRISONERS FROM THE PRISON, AND THEM THAT SIT IN DARKNESS OUT OF THE PRISON HOUSE.

ISAIAH 42:7

THE WAY

Issue #28 **1997**

Church Of Jesus Christ Christian •
Prisoner Outreach Newsletter

— NOTICE —

THE CHURCH OF JESUS CHRIST CHRISTIAN–ARYAN NATIONS IS A LAWFULLY ESTABLISHED CHRISTIAN IDENTITY CHURCH SO RECORDED BY THE STATE OF IDAHO, DEPARTMENT OF STATE.

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Title 42 USC § 2000bb, et al.
US Constitution Amendments #1, #4, #9, #10.

Any Unlawful Violation May Warrant
Criminal Prosecution

CHURCH of JESUS CHRIST CHRISTIAN
ARYAN NATIONS TEUTONIC UNITY

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http://www.nidlink.com/-aryanvic
aryannhq@nidlink.com
Phone: (208) 772-2408

PLAINTIFFS' APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Miller, et al., Plaintiffs,	Case No C2-98-275
v.	Judge Sargus
Reginald Wilkinson, et al., Defendants.	Magistrate Judge Kemp
	CLASS ACTION

STIPULATION OF PARTIES

(Filed May 3, 2000)

The Parties hereby stipulate that, for the purposes of the above-captioned lawsuit only, the ancient Nordic religion of Asatrú and related sects of Asatrú are an authenic and genuine religion. Accordingly, neither Party will present evidence in this case as to genuineness or lack of genuineness of the Asatrú religion.

Respectfully submitted,

/s/ Todd Marti
Todd R. Marti (0019280)
Trial Counsel for the Defendants
Assistant Attorney General
Corrections Litigation Section
140 East Town Street, 9th Floor
Columbus, Ohio 43215-6001
(614) 644-7233

/s/ Anne M. Doyle
Anne M. Doyle (0062618)
Trial Counsel for the Plaintiff

/s/ Craig Bryson
Craig Bryson
Legal Intern

/s/ Lisa M. Conn
Legal Intern
The Ohio State University College of Law
Clinical Programs
55 West 12th Avenue
Columbus, Ohio 43210
(614) 292-6821

PLAINTIFFS' APPENDIX J

AFFIDAVIT OF ALFAR KYNWULF, a.k.a., DARRYL BLANKENSHIP

STATE OF OHIO : ss
COUNTY OF WARREN

Now comes Alfar Kynwulf, a.k.a. Darryl Blankenship, and being advised as to the penalty of perjury does hereby certify that:

1. That on April 11, 2000, Major Mockabee entered my cell at the Warren Correctional Institution, where I am incarcerated as a state inmate, and removed from my cell various drawings and depictions of the Gods and Goddesses of the Asatru religion, as well as several pages of religious poems and prayers.

2. That on April 11, 2000, I filed a grievance against the removal of my drawings, prayers and poems from my cell and asked that same be returned (Grievance no. 04-00-08). On May 1, 2000, the Institution Inspector (Mr. DeHart) denied my grievance, but did acknowledge that Major Mockabee was in possession of my religious drawings, prayers and poems, and stated same would be returned to myself if appropriate. On May 3, 2000, I appealed this matter to the Chief Inspector at Central Office. On June 6, 2000, the Chief Inspector affirmed the decision of the Institution Inspector.

3. That twice during the month of June, 2000, I wrote to Warden Anthony Brigano requesting that the institution comply with Ohio law (R.C. 5120.42.7 & 5120.42.8) and Ohio Administrative Regulations (5120-9-19), by informing me of the reasons my religious drawings, poems and prayers were being withheld, and by allowing me to appeal the decision to withhold my materials to the Publication Screening Committee at Central Office. Warden Brigano refused to answer or respond to my letters and requests.

4. That on July 28, 2000, I filed a grievance against Warden Anthony Brigano due to his failure to abide by Ohio law (R.C. 5120.42.7 & 5120.42.8) by notifying me of the reasons for the withholding of my religious drawings, poems and prayers, and in failing to allow me to appeal same (Grievance no. CI-01-40). On September 29, 2000, the Chief Inspector denied my grievance against Warden Brigano, stating that a more appropriate remedy would be for me to write the Institutional Inspector a follow-up letter to my grievance and ask for the return of my religious items.

5. That twice in the month of October, 2000, I wrote letters to Mr. DeHart, the Institution Inspector, and asked

that the institution either return my religious material to myself, or in the alternative, that they abide by Ohio law (R.C. 5120.42.7 & 5120.42.8) and give me notice of the reasons they were withholding my religious material and allow me to appeal this decision to withhold to the Publication Screening Committee at Central Office. Mr. DeHart responded stating that he would inquire with Major Mockabee as to this matter.

6. That on November 20, 2000, I wrote Mr. DeHart, the Institution Inspector, a three page letter asking that my religious materials be returned to myself, or in the alternative, that the institution abide by Ohio law (R.C. 5120.42.7 & 5120.42.8) by informing me of the reasons why my religious drawings, poems and prayers were being withheld, and allow me to appeal this decision to withhold to the Publication Screening Committee at Central Office. On November 27, 2000, Mr. DeHart responded with a note in the margin of my kite stating: "THESE ITEMS HAVE BEEN REFERRED TO MR. MATT MEYERS THE ODRC STG COORDINATOR. UPON REVIEW HE MAY RETURN THEM." (Attached hereto as exhibit A).

7. At no time since the confiscation of my religious materials on April 11, 2000, has the institution abided by Ohio law (R.C. 5120.42.7 & 5120.42.8), by informing me as to the reasons why my religious drawings, poems and prayers were being withheld, nor have I been permitted to appeal the decision to withhold same to the Publication Screening Committee at Central Office.

8. Under the penalty of perjury and pursuant to 28 U.S.C. section 1746, I hereby certify the foregoing to be true and correct. Executed on this 11th day of December, 2000.

Respectfully,

/s/ Alfar Kynwulf/Darryl Blankenship
Alfar Kynwulf, a.k.a.
Darryl Blankenship # 295-771
Warren Correctional Institution
P. O. Box 120
Lebanon, Ohio 45036

Exhibit A

[Handwritten Note and Response]

11/20/00

Mr. DeHart:

Enclosed please find my third follow-up letter to grievance numbers 04-00-08 and CI-01-40.

Thank you,

/s/ Alfar Kynwolf
Alfar Kynwolf a.k.a.
Darryl Blankenship
295-771
2c-137

11/22/00

These items have been referred to Mr. Matt Meyers the ODRC STG Coordinator upon review he may return them.

/s/ DeHart

[Return]

Blankenship
Number: 295-771 Name Kynwolf Date 11/20/00

Unit 2c LOCK 137 ASSIGNMENT 2C Library Aide

TO Mr. DeHart, I.I.S.

ISSUED BY McPherson Nov. 27, 2000

State Business in Kite and Reason for Interview.

* * *

KITE PROCEDURE

1. *Check with your Correctional Counselor, or Case Manager to see if this communication can be handled with out a kite.*
2. *Write only to the Office that handles the problem you have. Other Offices will merely forward your kite.*
3. *State your problems clearly and completely and thereby get immediate attention.*
4. *Avoid duplication of Kites, writing to more than one office about the same thing will not obtain any faster attention.*
5. *Kites are to be used only for communication between resident and Staff and not for any other purpose.*

* * *

PLAINTIFFS' APPENDIX K

[Pg. from ODRC Publication for grant for Corrections Boot Camp for Non-violent Offenders Construction.]

ASSURANCES – CONSTRUCTION PROGRAMS

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0042), Washington, DC 20503.

PLEASE *DO NOT* RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET, SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.

NOTE: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the Awarding Agency. Further, certain Federal assistance awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. **Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.**

2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the assistance; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without permission and instructions from the awarding agency. Will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to assure non-discrimination during the useful life of the project.

4. Will comply with the requirements of the assistance awarding agency with regard to drafting, review and approval of construction plans and specifications.

5. Will provide and maintain competent and adequate engineering supervision at the construction site to ensure that the complete work conforms with the approved plans and specifications and will furnish progress reports and such other information as may be required by the assistance awarding agency or State.

6. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

7. Will establish safeguards to prohibit employees from [illegible] their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

8. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

9. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.

10. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 880-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686) which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101-6107) which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 93-255), as amended, relating to non-discrimination of the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to the confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to non-discrimination in the

sale, rental or financing of housing; (i) any other non-discrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements on any other non-discrimination Statute(s) which may apply to the application.

PLAINTIFF'S APPENDIX L

Application – Tier 1
Violent Offender Incarceration and Truth-in-Sentencing Program
State of Ohio

INTRODUCTION

Ohio continues to experience substantial growth in adult incarceration at the State and local level, as well as an expanding juvenile offender population. Ohio faces major challenges in our mission to protect Ohio citizens by ensuring effective supervision of adult and juvenile offenders in environments that are safe, humane and appropriately secure. While accomplishing this mission we also seek to instill in offenders an improved sense of responsibility and the ability to become productive citizens.

The Ohio Department of Rehabilitation and Correction (ODRC) currently houses over 48,000 prisoners (48,080 as of December 1998) in 31 institutions with the rated capacity of 35,390 beds (based on revised ACA standards for rated capacity). The persistent increases in inmate population and severe crowding magnify the physical plant issues that face the Department. The Governor, State Lawmakers and ODRC have responded to the challenge with increased capital expenditures, new and innovative

programming and community correction initiatives. However, the deterioration of older physical structures; over-extended demands on utilities and service areas, such as food and laundry; and the need for more stringent security due to the increased number of potentially violent inmates are needs that must be addressed.

Jail crowding continues to be a problem for local officials in Ohio. Crowded jails and failing physical plants are difficult to manage and hamper a jurisdiction's ability to operate in a safe, secure and constitutional manner. At the end of 1997 the average daily population in Ohio jails totaled 14,519 which represents a nine-percent increase from the previous year. This figure significantly understates the need because there were an estimated 12,488 sentenced offenders waiting to serve their sentence in a county jail. Outdated facilities that fail to comply with modern fire and building codes create a danger to staff, visitors and inmates. Nine jails in Ohio have not been upgraded or expanded since the 1800's. Additionally, the impact of Ohio's Truth-in-Sentencing legislation will likely escalate jail crowding beyond the year 2004.

The Ohio Department of Youth Services (ODYS) operates nine juvenile correctional facilities and two treatment centers one is currently under construction. The design capacity of these facilities is 1,408. The average daily population of these facilities hovers near 1,900 male and female offenders, or 142% of capacity. The Department also

* * *

PLAINTIFFS' APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN W. GERHARDT, Plaintiff, v. ALAN LAZAROFF et al., Defendants	CASE NO. C2-95-517 JUDGE SARGUS Magistrate Judge Kemp REPORT OF PLAINTIFF'S EXPERT Charles M. Montgomery JULY 13, 1999 (Preliminary Draft)

I. INTRODUCTION:

I have been retained as a career correctional practitioner who has worked in, managed, and administered a number of penal facilities including those that were in need of reformation to serve as an independent expert for the Plaintiff in the above captioned case. Essentially, I have been asked to render opinions as to whether there is a valid, rational connection between the defendants' refusal to permit Mr. Gerhardt to receive certain literature from the Church of Jesus Christ Christian (CJCC) and legitimate penological interests. I have also been asked to render my opinions as to whether there is a valid, rational connection between the defendants' refusal to permit Mr. Gerhardt to organize and participate in the CJCC religious services and any legitimate penological interest. Finally, I have been asked to render my opinions as to

whether Mr. Gerhardt has been denied reasonable access to his constitutional right to free exercise of religion.

II. QUALIFICATIONS, BACKGROUND, AND EXPERIENCE:

I believe I am well qualified to testify as an expert witness in this case by virtue of my education, training, and experience. I have been actively involved in federal, state, and commonwealth corrections for more than 34 years. During that time I have held a number of progressively responsible positions from line staff correctional officer to warden (at the institution level), and branch chief, division manager and director of institution operations at the central office level. Essentially, I have experience in virtually every type of penal facility from community corrections to maximum security housing, long and short term detention, and death row.

POSITION (Chronological order)	LOCATION	FROM	TO
Federal Bureau of Prisons			
Correctional Officer	Lompoc, CA	8/64	8/65
Senior Officer	"	8/65	4/69
Liaison Officer (Counselor)	"	4/69	10/69
Assistant Personnel Officer	"	10/69	10/70
Employee Development Specialist	"	10/70	2/72
Instructor STC	Atlanta, GA	2/72	9/72
Senior Instructor STC	"	9/72	3/73
Unit Manager	Seagoville, TX	3/73	10/74
Executive Ass't to the Warden	Lompoc, CA	10/74	1/76
Director CTC Complex	Detroit, MI	1/76	1/78
Superintendent	Safford, AZ	1/78	6/80
Warden, Georgia State Prison	Reidsville, GA	6/80	7/82

Associate Warden, Operations	Petersburg VA	7/82	1/83
Associate Warden, Programs	"	1/83	9/83
Chief of Unit Management,	Washington D.C.	9/83	11/85
Special Ass't, Federal Prison Industries (FPI)		11/85	3/86
Division Manager, UNICOR (FPI)	"	3/86	8/87

Over the years, I have provided technical assistance to numerous states and the Commonwealth of Puerto Rico as a private consultant, through the auspices of the National Institute of Corrections, the ACLU/National Prison Project, the National Academy of Corrections, and throughout my tenure with the Federal Prison System.

III. POST RETIREMENT FROM FEDERAL BUREAU OF PRISONS:

26. Consultant, Ford v The State of New York, Serious Assault, 99
25. Consultant, Gaines v Bellino, Hudson Co., NJ, Sex. Harrass., 99
24. Consultant, Turay v Washington, DOH, Serious Assault, 99
23. Expert Witness, Holder, v Harding, FBOP (DAN), Cross-Gender, 99
22. Consultant, Gerhardt v Lazaroff et al., Ohio, Religion, 99
21. Consultant, Daughtry v New York City, Inmate Assault, 98
20. Consultant, Weeks v Montana – Staff Assault by Inmate, 98
19. Consultant, Eakins v Chaffee (Calif.) – Excessive UOF, 98
18. Consultant, Krausch M. v Arizona – Improper Strip Search, 98
17. Expert Assistance, Coiner v U.S. – Witness Protection, 97

16. Consultant, Krausch P. v Arizona – Protective Custody, 97
15. Consultant, Sheppard v Phoenix (II), NYC – Excessive Force, 97
14. Consultant, Davis v City of Greenville, MS. – Malfeasance, 96
13. Consultant, Illick v Miller, Ely, Nevada – Use of Force, 96
12. Consultant, Maine v Oklahoma, Employee – Rape/ Civil Rights, 96
11. Expert Witness, Settle v Savage, AZ – Protective Custody, 96
10. Consultant, Sheppard v Phoenix, NYC – Excessive Force, 95
9. Consultant, McMullen v Harris County, TX – Jail Assault, 95
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Grand Jury: 1
Depositions: 9, 11, 12, 13, 15, 19, 21, 23
Case Settled: 8, 9, 11, 12, 13, 14, 19

IV. EDUCATION AND TRAINING:

My education and training background include one enlistment in the United States Marine Corps as a legal clerk (1956-59) and a degree in Correctional Science from Allan Hancock College, Santa Maria, California in 1969. During my tenure with the Federal Bureau of Prisons I personally received more than 2,000 hours of formal training, and participated in thousands of hours of additional training, in a variety of areas including Accreditation, Custody, Security and Control, Firearms, Self Defense, Riot Control, Hostage Negotiations, Correctional Counseling, Inmate Classification, Prison Gangs, Personnel Procedures, EEO Counseling, Investigations, Helping and Human Relations, Supervision and Group Performance, Unit Management, Executive Management and Quality Control as well as a number of interrelated subjects. I have also completed a number of speciality courses at the Wharton School of Management in Pennsylvania, John Jay College in New York, and through the auspices of the United States Civil Service Commission. I was a participant in the first (30 day) National Human Resource Development Institute that was sponsored by the American International College and the Federal Bureau of Prisons. Based on my proficiency and practical application of those human resource development techniques which had been developed by Robert R. Carkhuff, Ph.D., I was selected to serve as the primary instructor and program coordinator for the second (30 day) National HRD Institute that was conducted in Springfield, Massachusetts during the month of August, 1971. I was also a presenter of these same HRD techniques at the national American Correctional Association Convention which was held in Cincinnati, Ohio in 1971. I currently hold a provisional

teaching certificate in correctional science for community colleges in the State of Arizona. Finally, I believe the number of hours training and/or experience I have gained via OJT, as an instructor, at work conferences, as a consultant, and/or via self-study, etc., are essentially incalculable.

As part and parcel to my experience as a career correctional practitioner I have written numerous custodial policy and procedures including operational manuals in the areas of correctional counseling and unit management and I have been involved in the development of countless other policies and procedures. I also had functional responsibility for the development of two classification documents in the Commonwealth of Puerto Rico, one for sentenced prisoners and another for pre-trial/unsentenced prisoners. I have also written and/or coauthored a number of articles which have appeared in the following abstracts and publications: i.e., The Carkhuff Training Program, as Chapter 4 in the book entitled, The Crumbling Walls (Hosford and Moss), Training As A Preferred Treatment Alternative which appeared in the Symposium On Group Procedures – Helping The Public Offender (sponsored by the Georgia Department of Offender Rehabilitation), an article entitled Human Resource Development (HRD) Applications and Challenges to Corrections Workshop For Master Trainers and Consultants (in interpersonal skills for corrections) that was sponsored by Georgia State University and I have also contributed to the nationally renown Classification Manual for Managing Adult Inmates, by Herbert C. Quay, Ph.D..

V. COMPENSATION AND TESTIMONY AT TRIAL/ DEPOSITION:

I am being compensated at a rate of $100 per hour (plus routine expenses) for all work including the review of documents in preparation for testimony, depositions, and court/trial testimony.

VI. PREAMBLE TO MY FINDINGS IN THIS CASE:

The issue of uniqueness and/or the differences between the various types of custodial facilities, whether they be federal or state – prisons or jails, always seems to be raised in every case in which I have been involved. The fact of the matter is that the fundamental mission of every jail/penal facility in the United States is the protection and safety of the public, institution staff, and inmates, *period.* Consequently, I invariably concentrate my efforts on those custodial practices and procedures I believe have universal application and/or relevancy across the board. Thus, I will begin this portion of my report by paraphrasing several key operational practices and procedures I believe have particular relevancy to the Plaintiff and the Defendants' in this case as well as every other correctional/penal facility in the USA.

(1). Written policy, procedure, and practice provide that inmates have the opportunity to participate in practices of their religious faith that are deemed essential by the faith's judicatory, limited only by documentation showing threat to the safety of persons involved in such activity or that the activity itself disrupts order in the institution.

Comment: Religious practices include, but are not limited to, access to religious publications, religious symbols, congregate worship/religious services in appropriate space,

individual and group counseling, religious study classes, and adherence to dietary requirements. (Excerpts – American Correctional Association Standard 3-4459. Related Standards include 3-4460, and 3-4463, Standards for Adult Correctional Institutions, 3rd Edition)

Inmates *shall* have access to religious publications and the opportunity to adhere to dietary restrictions, etc. of their respective faiths if these activities do not jeopardize the security of the institution. (Excerpt, V., C., ACA Sample Policy 4.23.1)

(2). The Reasonable Relationship Standard: When a prison regulation impinges on inmates' constitutional rights, the regulation is valid only if it is reasonably related to legitimate penological interests. (Turner v. Safley, 482 U.S. 78, 89 107 S.Ct. 2254, 1987)

(3). A presumption of legitimacy attaches to newly formed religious groups, but the presumption may be rebutted by conduct which demonstrates that the religion is not authentic. (Excerpt – Religious Services, 001, Federal Standards For Corrections, U.S. DOJ)

(4). A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment. (Principle 28, Body of Principles For The Protection of All Persons under Any Form of Detention or Imprisonment, Human Rights and Law Enforcement, Centre For Human Rights, United Nations)

(5). Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change

his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in teaching, practice, worship and observance.

(Universal Declaration of Human Rights, Article 18, and The American Convention on Human Rights, Article 12, Human Rights and Law Enforcement, Centre For Human Rights, United Nations)

Finally, the First Amendment to the Constitution protects the free exercise of religion and the Supreme Court has held that reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty (Cruz v. Beto, 1972). In order to be protected by the Free Exercise Clause, beliefs must meet two requirements:

1. They must be religious, and
2. They must be sincerely held.

(Prisoners' Self-Help Litigation Manual, Boston/Manville, 3rd Edition, 1995)

While I recognize that the State of Ohio may not be *legally* bound to comply with the "universal standards" I have used, in part, to base/illustrate my opinions – I make reference to them for four specific reasons:

(A). As a fact finder I believe I am compelled to base my opinions and conclusions on something more than my personal preferences/biases.

(B). The standards I have alluded to above were developed and have been endorsed by some of the best minds in the field of corrections over the past 30 years.

(C). I believe the illustrations I have used have universal application and/or relevancy across the board nationally.

(D). I believe the standards I have used form a context for considering whether particular restrictions are rationally related to any legitimate penological interests.

VII. BACKGROUND/OVERVIEW OF THE CASE:

Essentially, the fundamental facts of this case as I understand them at this time are as follows: John W. Gerhardt is presently incarcerated in the Orient Correctional Institution in Pickaway County in the State of Ohio. Mr. Gerhardt is a member of the Church of Jesus Christ Christian.

In 1973 John W. Gerhardt was ordained as a minister through the Mountain Church of Jesus Christ, of Howell, Michigan. Subsequently, he was ordained as a minister by the Christian Identity Church.

As I understand it, the Christian Identity Church asserts religious doctrines which it believes are based upon the Holy Bible. Included among its biblically-based doctrines is a belief in the non-violent separation of the races. Mr. Gerhardt is a Caucasian of non-Jewish descent. *(The Way,* Issue #26, Pages 6-8)

The Christian Identity Church issues several publications, including *The Way* which is a Prison Outreach Newsletter.

In the past, Mr. Gerhardt has sought to have Christian Identity religious services conducted within the *Orient Correctional Institution* for his benefit and for the benefit of co-religionist therein.

Essentially, the Defendants have denied, in their *Answer With Jury Demand* (12/97), each and every substantiative allegation including whether John Gehardt is a member of the Church of Jesus Christ Christian (for lack of knowledge). They have also denied the siezure/rejection of *The Way* publication, and that Mr. Gerhardt has been punished or retaliated against in any way as a result of his attempts to receive religious materials, etc.

Note: I have not been provided with any documentation that would support the Defendants position in this regard.

VIII. PRIMARY BASES FOR MY OPINIONS:

It is my understanding that: (1) a fact finder may conclude that a prison or jail official knew or should have known about substantial operational and/or security problems from the very fact that said problems were obvious and, (2) whether a prison official had the requisite knowledge is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.

(1). "An inmate may receive a reasonable number of printed materials directly from a publisher or distributor. Such materials may be received from other sources such as the inmate's family or friends with prior approval of the managing officer or designee. All materials are subject to security inspection and review pursuant to this rule." (Baldwin's Ohio administrative Code, Approved Edition

5120. Department of rehabilitation and Corrections Chapter 5120.9 Institutions, June 30, 1998)

(2). "Printed material, to be excludable, must be obscene or inflammatory." (Same Citation)

(3). "The printed material is inflammatory if it would be detrimental to the security, good order or discipline of the institution, or would facilitate criminal activity." (Same Citation)

(4). "No publication shall be considered inflammatory solely on the basis of its appeal to a particular ethnic, racial, or, religious audience." (Same Citation)

(5). "All printed material which the mail office reasonably believes to be either obscene or inflammatory shall be withheld from the inmate. The mail office shall promptly notify the inmate of the identification of the printed material, the reason for its being withheld, and the inmate's right to a review by the managing officer or designee." (Same Citation)

(6). The inmate may request a review of the mail office's decision to withhold the printed material. The printed material shall be forwarded to the managing officer or designee. (Same Citation)

(7). Within five working days or as soon as practical after receipt of the printed material, the managing officer or designee shall decide whether the printed material is acceptable. (Same Citation)

(8). A decision to exclude the printed material shall be in writing, setting forth that the material is either obscene or inflammatory, or both, and the reason(s) therefore. A copy of such written decision shall be forwarded promptly to the

inmate together with notice of the inmate's right to request, within five working days, review by the publication screening committee. (Same Citation)

(9). Failure of the inmate to request review of the mail office's decision to withhold the printed material, within five working days of notice thereof, shall constitute acceptance of that decision and the printed material shall be disposed in accordance with paragraph (H) of this rule. (Same Citation)

IX. PRIMARY FINDINGS AND CONCLUSIONS:

(01). From its very inception in 1870 the American Correctional Association has recognized and emphasized the role of religion in the correctional process. It is no coincidence that "penitentiary" and "reformatory" are religious terms connoting penance and spiritual inspiration for reforming offenders. (ACA Manual of Correctional Standards, 1971).

(02). The light of reasoning and experience has led me to conclude that Religion can be one of the most important ingredients in the overall successful re-integration process (back into the free community). Indeed, for some I believe it may very well be the single most important ingredient. (e.g., Chuck Colson)

(03). Based upon my experience over the past 35 years I believe every reasonable effort must be made to accommodate religious diversity in every penal facility in the United States of America. In spite of the Supreme Court's ruling against the well intended Religious Freedom Restoration Act of 1993 I do not believe it was the court's intent to elevate administrative convenience per se above

the duty to fully justify substantial restrictions on religious publications/worship.

As noted earlier, the Ohio State Administrative Code clearly states that "No publication shall be considered inflammatory solely on the basis of its appeal to a particular ethnic, racial, or religious audience" (Baldwin's Ohio Administrative Code, Approved Edition 5120. Department of Rehabilitation and Corrections Chapter 5120.9 Institutions, June 30, 1998)

(03). The Church of Jesus Christ Christian-Arayan Nations (CJCC/AN) is indeed a lawfully established Christian Identity Church so recorded by the State of Idaho, Department of State.

(04). I have read every line of *THE WAY* in Issues Number 9, 25, 26, 28, 29, 30 and 31 and I have found nothing contained in these Newsletters that should pose a threat to institution security, good order or discipline:

A). I did not find it to he patently offensive, obscene or sexual.

B). I did not find it to be any more inflamatory than the teachings of Malcolm X, or Louis Faarrakan, etc.

C). I found nothing contained therein which could facilitate criminal activity.

D). I found nothing contained therein that would incite any more physical violence than that which has been articulated by a number of other religions.

(06). Essentially, I found *THE WAY* to be both religious and political. Indeed, I found it to be as much akin to

William F. Buckley's *National Review* magazine as any religious publication I have read.

Note: On the editorial page of *The Way,* issue #25, Pastor Richard G. Butler refers to three specific publications; i.e., *The Way,* our Prisoner Outreach Newsletter; *Calling Our Nation,* our Flagship Publication; and *CJCC-AN Newsletter* all carry intriguing articles on Identity Christianity, history and "geo-politics" (which is the study/application of the influence of political and economic geography on the national power, foreign policy, etc., of a state).

(07). Although dedicated to the (non-violent) SAFEGUARD OF THE EXISTENCE AND REPRODUCTION OF THE WRITE RACE and the belief that all Aryan groups are linked by genetic heritage I do not believe the CJCC can, or should, be viewed in the same light as a number of self acknowledged militant/disruptive groups such as the Aryan Brotherhood, the Skinheads, and the Ku Klux Klan, etc..

(08). As I understand the racist/isolationist nature of CJCC's religious creed/manifesto it appears to be no more violent, disruptive, divisive, or exclusionary than those held by other equally devout groups. As a thirty-five year correctional practitioner I do not believe devout supporters of the CJCC should present any more of a problem for correctional administrators than does ardent, activist, and/or otherwise overzealous supporters of any other religious beliefs including Atheism, Christianity, Islam, Jehovism, Judaism, Mormonism, and Satanism, etc. In the 1960's Federal Correctional Administrators had to deal with a number of issues related to Muslim beliefs such as facial hair, Friday as their holy day, and the wearing of hijabs, etc.

(09). Obviously, it is virtually impossible to allow some prisoners to congregate or intermingle for security reasons. Likewise, it would he impossible to provide regular church services for each and every religious denomination or sect (regardless of size). Therefore, I believe the onus in on prison administrators to provide REASONABLE ALTERNATIVES to prisoners by which they can exercise the religious freedom that is guaranteed to them by the First and Fourteenth Amendments of the Constitution of the United States of America. This is why I place such a high emphasis on allowing prisoners to have access to printed materials such as "The Way". I believe this can reasonably be accommodated in a number of ways including restricted correspondence, self study, video and/or audio tape.

X. SUMMATION:

The bottom line is that I do not believe religious views/symbols which pertain to the *nonviolent* preservation of the white race per se should be discounted/excluded out of hand. Indeed, unless it can be demonstrated that the CJCC is or has been directly tied in with a Security Threat Group (STG), or some other activity which poses a legitimate threat to institution security and stability, I believe conscientious correctional professionals must learn to deal with the CJCC and other religious groups in an honest, straight forward manner.

In point of fact, I do not believe there is any rational basis by which to exclude said religious materials from the Orient Correctional Institution.

I RESERVE THE RIGHT TO MODIFY MY FINDINGS AND OPINIONS AS ADDITIONAL DETAILS BECOME AVAILABLE TO ME.

/s/ Charles M. Montgomery 7/13/99
CHARLES M. MONTGOMERY TODAY'S DATE

Appendixes A-C = Information considered in forming my opinions.

APPENDIX "A"

INFORMATION CONSIDERED IN FORMING OPINIONS

(01). Third Amended Complaint

(02). Appendix to Third Amended Complaint

(03). Defendants Answers With Jury Demand

(04). 5120-9-06 Inmate Rules of Conduct and Statement of Policy of Institutional Rules (4 pages)

(05). 5120-9-19 Printed Materials (4 pages)

(06). Issues Nos. 9, 25, 26, 27, 28, 29, 30 and 31 of THE WAY

(07). James Ricketts – Disclosure

(08). Matthew Meyer – Disclosure

(09). A number of relevant ACA Standards (3-4454 through 3-4463, Pages 155-157; 3-4432 & 3-4433, Pages 147-148)

(10). A number of relevant ACA Guidelines (Policies & Procedures, 4.23.1 & 4.23.2, Pages 443-449; 4.16-1 and 4.16.2 Pages 373-379)

(11). A number of relevant Federal Standards for Corrections (DOJ, Religious Services, 001-004; Mail & Visiting, 001-014)

(12). Human Rights and Law Enforcement, Center for Human Rights, United Nations, New York and Geneva (See Attachment "B")

(13). Memo to File Regarding telephone conversation with Mike Sandal, Correctional Services Administrator, Federal Bureau of Prisons, Western Region

(14). Prisoners' Third Edition Self-Help Litigation Manual (Publications, Pages 161-166; Religious Freedom, Pages 201-219; The Reasonable Relationship Standard, Pages 147-151)

(15). Code of Federal Regulations dated 7/1/97 (548-Religious Programs, Pages 522-524; Correspondence, Pages 451-457)

(16). ACA Publication "Point Counterpoint" 1998 (Pages 30-31)

(17). The Corrections Yearbook, 1998 (Pages 2, 13, 15, 20, 26, 28, 40, 42, 72, 130 and 148)

(18). ACA Directory, 1998 (Page 388)

(19). Proposed Administrative Rules 5120-9-19 (3/3/99)

(20). Printout of MISC Publication Screening Information

(21). Sign posted regarding job opening for "African-Americans"

ATTACHMENT "B"

INTERNATIONAL STANDARDS

There are a number of *international standards* which are applicable to all law enforcement personnel – including correctional officers. These particular standards have been promulgated by a number of bodies within the United Nations system. Foremost among those has been the periodic United Nations Congresses on the Prevention of Crime and the Treatment of Offenders. The adoption of these standards has given them the character of universality; i.e., they are accepted by the international community as a whole as the minimum rules for law enforcement/corrections personnel regardless of the legal system or municipal law framework of the member State.

The United States of America has ratified a number of international human rights treaties. It is therefore legally bound to comply with them. Additionally, many human rights requirements are contained in standards which have been adopted by the international community but which are not in the form of treaties. Although these standards do not technically have the legal power of treaties, they have the moral force of having been negotiated by governments and of having been adopted by political bodies such as the UN-General Assembly, usually by consensus. The United States of America has played a major part in drawing them up and agreed that they should be adopted.

(Amnesty International, Rights For All, 1998)

Excerpts from the International Standards on Ethical and Legal Police/Law Enforcement Conduct: (Note: The Code of Legal and Ethical Conduct for Law Enforcement Officials consists of eight articles beginning on Page 37, Paragraph 179)

Article 1 requires law enforcement officials to fulfill the duty imposed on them by law. The term "law enforcement officials" is defined as all officials who exercise police powers, especially powers of arrest or detention.

Article 2 requires law enforcement officials to respect and protect human dignity and maintain and uphold human rights.

Among the rights which are fundamental to democratic political processes and to the principles set out above are as follows: (Pages 42-43)

(i). The right to freedom of thought, conscience and religion

(ii). The right to freedom of opinion and expression

(iii). The rights to freedom of peaceful assembly and association.

Religious freedom is protected under article 18 in the following terms:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. (272, Page 52)

Principle #1 in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states:

> "All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person." (Pg 180)

(Human Rights and Law Enforcement, Center For Human Rights, United Nations, 1997)

APPENDIX "C"

January 19, 1999

MEMO TO FILE: CHURCH OF JESUS CHRIST CHRISTIAN/ARYAN NATIONS (CJCC/AN)

I contacted Mike Sandel, Correctional Services Administrator, Federal Bureau of Prisons, Western Region, 7950 Dublin, California, 94568 shortly before noon. (I knew Mike when he was the Chief Correctional Supervisor at FCI Sheridan, Oregon and Phoenix, Arizona)

(1). I asked, "Do you know if the Federal Bureau of Prisons recognizes the Church of Jesus Christ Christian which is essentially a white supremacy organization?"

Mike Sandel: Let me call you back.

Within the hour, Mike called back (presumably after checking with the WRO Administrator for Chaplaincy Services or someone else). He stated, "It is recognized as a legitimate religion that is aligned with the Christen Identity, but no meetings are allowed."

(2). I asked, "Do you know if the Federal Bureau of Prisons allows CJCC/AN's newsletter/publication "THE WAY," inside (federal prisons)?"

Mike Sandel: "I don't know for certain. It might be up to each institution. Let me put you on hold for a minute or two and I will check." (I remained on hold)

Shortly thereafter, Mike came back on the telephone and informed me that he had just placed a call to the SIS (Security Investigations Supervisor) at Sheridan, Oregon (where Mike had been previously assigned as the Chief Correctional Supervisor) and he informed me that, "They do allow the *The Way* in at FCI Sheridan."

Comment: Indeed, why shouldn't they – in my experience the BOP has always done its best to accommodate all religions/races; e.g., pork free diets, Kosher meals, and sweat lodges etc. Likewise, I believe they have allowed literature in from black supremacy advocates (and others) such as Louis Farrakhan and Malcolm X, etc. (During my tenure with the BOP these decisions were essentially made on an institution by institution basis. Many of these types of issues do not effect each and every facility in the same degree or manner)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

JOHN MILLER, et al.,	:	**Case No. C2-98-275**
Plaintiffs,	:	**MAGISTRATE JUDGE KEMP**
v.	:	
REGINALD WILKINSON, et al.,	:	**CLASS ACTION**
Defendants.	:	
JOHN GERHARDT,	:	**Case No. C2-95-517**
Plaintiff,	:	**JUDGE SARGUS**
v.	:	**MAGISTRATE JUDGE KEMP**
ALAN LAZAROFF, WARDEN, et al.,	:	
Defendants.	:	

JOINT STIPULATIONS OF FACT RELATED TO DEFENDANTS' CHALLENGE TO THE CONSTITUTIONALITY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

(Filed Mar. 19, 2001)

It is stipulated by and between all Plaintiffs and all Defendants as follows:

1. These stipulations are based on agreements reached between counsel and informal, unsworn personal and telephone interviews of Ohio Department of Rehabilitation and Correction ("ODRC") employees by

Counsel for the inmate Plaintiffs. The interviews were agreed to in lieu of formal discovery as a rapid and economical means to gather information relevant to Defendants' challenge to the constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") through their "Partial Motion[s]s to Dismiss" ("Defendants' Motion"). The Defendants did not object to or otherwise interfere with the Plaintiffs' ability to conduct formal discovery regarding the matters relevant to the Defendants' Motion. The information contained in these stipulations is not exhaustive and is not necessarily all of the relevant information which may be known or available to the Plaintiffs, the ODRC Defendants and others working under their supervision. The Parties may supplement the facts stipulated to in this document with additional evidence not inconsistent with the facts stipulated herein, and the parties' agreement to these stipulations shall in no way be considered to be a concession by the parties' of the inaccuracy or invalidity of the facts and evidentiary matters set forth in or in support of the Defendants' Motion and/or Plaintiffs'. However, the facts stipulated in this document are as binding on the parties as if they were found by the Court after a full evidentiary hearing.

2. As used in these stipulations, ODRC refers to all named defendants and persons working with them or under their supervision in their official capacities.

3. ODRC regularly applies for federal grants. Such grants are awarded by the funding agency, and ODRC subsequently receives federal funds pursuant to those grants. ODRC has received federal grant awards since September 22, 2000 but no funds including those described in paragraphs 4 through 9, inclusive, below, have been received through these awards. It is not anticipated that ODRC will receive any federal funds attributable to grants made and

accepted after September 22, 2000 until August 2001 at the very earliest.

4. Some federal grant funds are received by ODRC directly from the federal government, other federal funds are received as "Pass-Through" to ODRC from other State of Ohio Departments.

5. One federal grant received by ODRC is the Violent Offender Incarceration and Truth in Sentencing Incentive Grants ("VOI/TIS"). The current award is approximately $12,000,000. ODRC has received this grant for three successive years for a total of approximately $69,000,000 to date. The last time ODRC received a grant from the federal government was in November 2000. However, this grant was attributable solely to an application made and accepted before September 22, 2000. There will be a substantial time lag between the date that the application is granted and accepted and the time that ODRC receives any money pursuant to that grant. It is not anticipated that ODRC will receive any federal funds attributable to this grant until August 2001 at the very earliest. ODRC plans to reapply for this grant on an annual basis and will continue to do so. It is expected that future applications for this federal grant will be awarded annually as long as Congress continues to fund the applicable program.

6. ODRC receives an annual federal grant known as the State Criminal Alien Assistance Program ("SCAAP"). This grant reimburses ODRC for the costs of incarcerating aliens convicted of felonies in Ohio. The last annual grant award was for $1,300,000. That grant was awarded and accepted prior September 22, 2000. The most recent application for an additional SCAAP grant was submitted to the federal government during the summer of 2000 and is currently pending. The ODRC Defendants believe that the application

will be approved and granted. Such applications for federal grants generally take about nine months to be processed. Ohio's annual award under SCAAP is usually about $1,000,000 dollars. There will be a time lag between the date that the application is granted and accepted and the time that ODRC has access to any money pursuant to that grant.

7. There are other grants applied for annually that provide the ODRC Defendants with federal money on an annual basis. These include, but are not limited to, federal grants for adult basic education, special education and vocational education. The Defendants expect that they will be awarded, assuming that Congress continues to fund the applicable programs.

8. ODRC is currently reimbursed on a monthly basis by the federal government pursuant to at least two grants: the Federal School Breakfast Program with a current award amount of $437,141; and the Federal School Lunch Program with a current award amount of $777,983 Those reimbursements are and will be made pursuant to the grants made and accepted prior to September 22, 2000. ODRC has reapplied for these funds and will continue to do so. It is expected that ODRC will continue to receive federal funding for these programs as long as Congress continues to appropriate money for the programs.

9. ODRC routinely applies for and receives federal funds that it uses to pay for a portion of its programs, construction and operations costs. ODRC currently has applications for federal funds pending. These include: FY 2000 SCAAP. The applications being prepared for submission include: FY2001 VOI/TIS. There will be a substantial time lag between the date that the application is submitted, granted and accepted and the time that ODRC receives any money pursuant to that grant. That lag will be at least 6

months from a July 2001 submission date. The ODRC Defendants believe that some or all of these applications will be granted to the extent that Congress continues to fund the relevant grant programs.

10. ODRC operates a program entitled Ohio Prison Industries ("OPI"), partially described in paragraphs 10 through 15, inclusive, below. In this program, ODRC inmates produce goods and services, some of which are sold to buyers outside of the Ohio Department of Rehabilitation and Correction. The Plaintiffs do not claim that any aspect of OPI's operations substantially burden their ability to exercise their faith.

11. Since 1987, ODRC has had a contract with Unibase, a Utah corporation specializing in information technology. Under the terms of this contract, Ohio prison inmates at Lebanon Correctional Institution and London Correctional Institution perform data entry services for Unibase on computers located at the institutions where the inmates are incarcerated. Unibase pays ODRC for the inmates' work. Currently, 80-100 Lebanon Correctional Institution inmates and 50 London Correctional Institution inmates are working under the Unibase contract. Approximately 50 inmates at the Ohio Reformatory for Women are projected to start work under this contract in the near future.

12. ODRC sells some inmate produced products to departments of correction in other states. For example, the ODRC Defendants have sold shoe soles to the State of Oklahoma and cafeteria tables to the State of Maine.

13. Ohio inmates produce products such as shoes, beds, furniture, and mulch for agencies of the State of Ohio using raw materials and products produced outside

of Ohio. Many of these agencies pay ODRC for such products.

14. Ohio inmates also produce and recycle safety reflectors used on highways in Ohio and thereby save the state approximately $1 million dollars per year. The Ohio Department of Transportation pays ODRC for these reflectors.

15. Inmates assemble snowplows and salt spreaders for State use on vehicles already owned by the State of Ohio. ODRC is paid for this work.

16. 18 U.S.C. § 1761 restricts the interstate sale of inmate-made goods, but not services.

17. Each ODRC institution is responsible for most of its own purchasing.

18. Orient Correctional Institution ("OCI") officials periodically purchase computers and motor vehicles through interstate commerce. They purchased two motor vehicles during the last fiscal year. OCI purchasing is representative of the purchasing at the other penal institutions operated by ODRC, except those described in paragraphs 19 and 22-24, inclusive, below.

19. The combined cost of and medical supplies used at OCI and Pickaway Correctional Institution ("PCI") $2,000,000 per year. In addition, mental health medications for those institutions cost between $20,000 and $60,000 per month. These medications and supplies are purchased through interstate commerce. All institutions spend a significant amount of money on medicine and medical supplies. However, the amount spent on those goods and services at OCI and PCI is higher than the amounts spent at other ODRC institutions because Fraizer Medical Center is located at OCI.

20. OCI pays the non-Ohio companies of Ameritech and Quest approximately $1,800 and $500 per month, respectively, for local and long distance telephone service.

21. ODRC has an exclusive contract with MCI Communications, an interstate corporation, to provide all inmate telephone service, which consists of thousands of collect calls to locations inside and outside of Ohio. ODRC receives compensation from MCI Communications based on a percentage of revenue generated by these collect calls.

22. ODRC has contracts with Management and Training Corporation and CiviGenics Corporation to operate two prisons owned by the State of Ohio housing Ohio inmates. Management and Training Corporation is a Utah corporation which operates the Lake Erie Correctional Institution in Conneaut, Ohio ("LaECI"), and CiviGenics Corporation is a Massachusetts corporation which operates the North Coast Correctional Treatment Facility in Grafton, Ohio ("NCCTF"). Both corporations also operate privately owned prisons under contracts with other states. No Plaintiff has been or is incarcerated at either LaECI or NCCTF.

23. LaECI has 1,380 beds. Management and Training Corporation is currently paid a per diem of $36.40 per inmate. The per diem will increase to $38.04 shortly.

24. NCCTF has 552 beds, and CiviGenics is paid a per diem of $53.11 per inmate, which will increase to $55.39 on October 1, 2001.

25. According to a 1996 study by ODRC, 32.5% of inmates released from ODRC return to jail for a parole violation or for a new crime within three years. Of the persons released on judicial release, 29.1% return

to incarceration. Of the persons released on shock probation, 37.6% return to incarceration. Of the persons released on parole, 41.3% return to incarceration. Of the persons released from boot camp, 22.6% return to incarceration; and of the persons released on shock parole, 19.8% return to incarceration.

26. The State of Ohio is a member of an interstate corrections compact, pursuant to ORC § 5120.50. Under the interstate corrections compact, Ohio currently has agreements with twenty states providing for the exchange of prisoners between these states. Under the terms of these agreements, Ohio exchanges prisoners with other states on a regular basis. Presently, Ohio houses seventeen inmates convicted in other states and exchanged under the compact. Eighteen inmates convicted in Ohio are incarcerated in the prisons of other states. Ohio also has an agreement with the Federal Bureau of Prisons which provides for the exchange of inmates between federal and state institutions. Ohio is currently housing twelve prisoners sent by the Federal Bureau of Prisons, while ten Ohio convicts are incarcerated in federal detention facilities. The Plaintiffs do not claim that any aspect of this compact substantially burdens their ability to exercise their religion.

27. One reason that inmates convicted of Ohio crimes are housed in states other than Ohio is witness protection. Another is that some inmates pose security threats or behavior problems that ODRC has determined can best be handled by transferring inmates to prisons in other states.

28. Between January 1, 2000 and September 30, 2000, Ohio referred approximately 2,000 persons on probation or parole to supervision by the probation and parole authorities of other states pursuant to the

provisions of the applicable interstate compact, interstate agreements and Ohio statutes. The out-of-state probation and parole authorities accepted approximately 1,400 of these persons for supervision. This frequency of referral and acceptance of probationers and parolees is typical of the frequency of referrals and acceptances during similar periods of other years. Approximately 2,400 persons placed on probation and parole by other states are referred to Ohio for supervision each year pursuant to the applicable interstate correction compact. The State of Ohio accepts about 1,900 of these people for supervision annually. In all cases, supervision continues until each person's term expires or until there has been a probation or parole violation. The Plaintiffs do not claim this compact substantially burdens their ability to exercise their religion.

The foregoing 28 paragraphs of stipulations are approved and agreed to by:

BETTY D. MONTGOMERY
Attorney General

/s/ Todd R. Marti
TODD R. MARTI (0019280)
Assistant Attorney General
Corrections Litigation Section
140 East Town Street, 9th Floor
Columbus, Ohio 43215-6001
(614) 644-7233
Counsel For the Defendants in *Gerhardt v. Lazarff* and *Miller v. Wilkinson*

/s/ David Goldberger
DAVID GOLDBERGER (0010292)
The Ohio State University College of Law
55 West 12th Ave.
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(614) 292-1536
Counsel for the Plaintiff Class in *Miller v. Wilkinson*

/s/ Benson Wolman
BENSON WOLMAN (0040123)
Wolman Genshaft & Gellma
341 South High Street, Suite 301
Columbus, Ohio, 43215-5463
(614) 280-1000
Counsel for Plaintiff in *Gerhardt v. Lazaroff.*

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

LEE HAMPTON, et al.,	:	**Case No. C2-97-382**
Plaintiffs,	:	**JUDGE GRAHAM**
v.	:	**MAGISTRATE JUDGE ABEL**
REGINALD WILKINSON, et al.,	:	
Defendants.	:	

SECOND AFFIDAVIT OF HORST GIENAPP

Now come Defendants and file the "Second Affidavit of Horst Gienapp", attached hereto.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

/s/ Todd R. Marti
TODD R. MARTI (0019280)
Assistant Attorney General
Corrections Litigation Section
140 East Town Street,
14th Floor
Columbus, OH 43215
(614) 644-7233

[Certificate of Service Omitted in Printing]

SECOND AFFIDAVIT OF HORST GIENAPP

State of Ohio :
: ss.
County of Franklin :

Now comes Horst Gienapp, having been first duly sworn, and states and affirms as follows:

1. I am the Grants Administrator for the Ohio Department of Rehabilitation and Correction ("ODRC") and have held that position since April 2, 1995. Among my duties are overseeing ODRC's efforts to obtain federal funding, including the process of applying for such fund and reviewing grant conditions and dealing with problems in the administration of grants. As a result of my duties in that position, I have personal knowledge of the matters set forth herein.

2. In my affidavit of October 23, 2000, I incorrectly stated that ODRC was receiving 27 separate federal grants as of September 22, 2000. That statement was incorrect. In fact, ODRC was only operating under 22 federal grants. Initially, I had miscounted the total number of grants considered. The correct total of those grants was in fact 26, not 27. Further, one of those grants had expired prior to September 22, 2000. That was the Library Services and Construction Act Grant. Finally, three other grants listed in that affidavit were made to ODRC by other agencies of the State of Ohio and involved no federal funds. Those grants were the Special Education-Unit Allocation (Reimbursement) Grant, the Adult High School Grant, and the GED Testing grant. Finally, I had miscounted the total number of grants, When those adjustments are made, ODRC was in fact receiving only 22 federal grants as of September 22, 2000.

3. The purposes of federal grants are set forth in one or both of two documents. The first is the *Catalog of Federal Domestic Assistance. ("CFDA"),* prepared and published jointly by the United States General Services Administration, the Executive Office of the President, and the Office of Management and Budget. The *CFDA* describes both the purposes of the grant and any restrictions on the permissible uses of grant funds. The CFDA is available to the general public in book form and on line at www.cfda.gov/default.htm.

4. The second source for determining the purpose of a federal grant is an individualized, written statement from the grantor agency to the recipient of the grant. Such a written statement sets forth the grantor agency's understanding of what the federal government is funding. Such statements are not made in all cases, and their format varies from grantor to grantor.

5. The first of the 22 federal grants received by ODRC is the Intensive Confinement Construction Grant. The *CFDA* indicates that the grant's objective is to help state and local governments build or expand correctional facilities. The grantor agency is the United States Department of Justice ("USDOJ"), and its individualized statement of the purpose of the grant is that "grant funds will be used for site improvements and interior construction costs." The funds are used exclusively for construction purposes, and inmates are in no way involved with the expenditure of those funds. See Exhibit 1 hereto. The *CFDA* description of this program is available on line at www.cfda.gov/public/viewprog.asp?progid=535

6. The second of the 22 grants received by ODRC is an Immigration and Naturalization Service video teleconferencing grant. The *CFDA* states that the purpose of that grant is to "improve cooperative efforts between law enforcement agencies . . . through the

use of technology." Consistent with that purpose, ODRC has used grant funds exclusively to purchase videoconferencing technology to allow prisoners to participate in immigration and other hearings held at other locations without having to leave prison. The *CFDA* description of this program is available on line at www.cfda.gov/public/viewprog.asp?progid=559.

7. The third of the 22 federal grants received by ODRC is a grant for reducing correctional officer stress. The grantor agency is USDOJ, and its individualized statement indicates that the purpose of the grant is "to implement a comprehensive stress-reduction program for corrections officers in five Ohio correctional facilities and their families." The grant funds are used exclusively for staff and are not in any way used in connection with inmates. See Exhibit 2 hereto.

8. The fourth of the 22 federal grants received by ODRC is a grant to research the effect of Ohio's truth-in-sentencing legislation. The grantor agency is USDOJ, and that agency's individualized statement indicates that the "project will examine the impact of Ohio's new sentencing reform measures on inmate behavior within the institutional setting." The grant funds only research. It does not fund any programming and does not involve inmates in any way. See Exhibit 3 hereto

9. The fifth of the 22 federal grants received by ODRC is the State Criminal Alien Assistance Program ("SCAAP"). The *CFDA* indicates that SCAAP's objective is to "provide federal assistance to states . . . for costs incurred for the incarceration of undocumented criminal aliens convicted of a felony" and that "there are no restrictions on or prescribed use of the funds." The *CFDA* further indicates that SCAAP funds are "essentially assistance to defray the costs *previously* incurred by jurisdictions for the housing of undocumented criminal aliens." (emphasis added). In other

words, these funds have no federally specified purpose and ODRC utilizes those funds primarily for staff development. The *CFDA* description of this program is not available on line but is attached as Ex. 4 hereto.

10. The sixth of the 22 federal grants received by ODRC is the Violent Offender Incarceration/Truth-in-Sentencing Grant ("VOITIS"). The *CFDA* describes the purpose of this grant as being "to provide funds to individualized states . . . to build or expand [] correctional facilities to increase the bed capacity for the confinement of [] violent offenders." The grantor agency is USDOJ, and its individualized statement indicates that the grant is used exclusively for planning and constructing new prisons and jails. Those funds are used only for construction/acquisition related purposes, and inmates are in no way involved with the expenditure of VOITIS funds. See Exhibit 5 hereto. The *CFDA* description of this program is available on line at www.cfda.gov/public/viewprog.asp?progid=535

11. The seventh of the 22 federal grants received by ODRC is the Adult Basic Education Grant. The *CFDA* identifies the grant's objective as assisting the states "to provide, on a voluntary basis, adult education and literacy services." Although the program is federal, ODRC's grantor is the Ohio Department of Education. ("ODE"). The individualized statement prepared by that grantor indicates that ODRC's funds are to be used exclusively for educational purposes. I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or actions have interfered with their ability to participate in or benefit from this program. See Exhibit 6 hereto. The *CFDA* description

of this program is available on line at www.cfda.gov/public/ viewprog.asp?progid=945

12. The eighth of the 22 federal grants received by ODRC is a grant to provide educational assistance to delinquent and at-risk children in ODRC's custody. The *CFDA* indicates that the funds are restricted to "educational and educationally related services." I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or action interfered with their ability to participate in or benefit from this program. The *CFDA* description of this program is available on line at www.cfda.gov/public/viewprog.asp?progid=950

13. The ninth of the 22 federal grants received by ODRC is a grant made pursuant to Title VI of the Elementary and Secondary Education Act. The *CFDA* indicates that the use of grant funds is restricted to certain specified educational activities. ODRC uses those funds exclusively for staff development programs for employees engaged in its educational programming. Inmates are in no way involved with the use of these funds. The *CFDA* description of this program is available on line at www.cfda.gov/public/viewprog.asp?progid=1057

14. The tenth of the 22 federal grants received by ORDC is a special education grant made pursuant to the Individuals with Disabilities Education Act. It is used exclusively to assist in the education of disabled inmates. I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or activities interfered with their ability to participate in or benefit from this program.

15. The eleventh of the 22 federal grants received by ODRC is the grant for the vocational education of criminal offenders in correctional institutions. I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or actions interfered with their ability to participate in or benefit from this program.

16. The twelfth of the 22 federal grants received by ODRC is a grant pursuant to the Child Nutrition Act. That grant reimburses ODRC for portions of the costs of breakfast served to minors in its custody. The grant does not fund any programming but is used exclusively to defray the costs of meals already served to qualifying inmates. I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or actions interfered with their ability to participate in or benefit from this program.

17. The thirteenth of the 22 federal grants received by ODRC is a grant pursuant to the National School Lunch Act and, it is used to reimburse ODRC for portions of the cost of lunches provided to certain inmate It does not pay for any programming but only reimburses ODRC for a portion of the cost of meals previously served. I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or actions interfered with their ability to participate in or benefit from this program.

18. The fourteenth of the 22 federal grants received by ODRC is a grant whose objective, according to the *CFDA*, is "to assist incarcerated young offenders in

obtaining post-secondary education and post-secondary vocational training." Those funds are used exclusively for paying educational and vocational training expenses. I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or actions interfered with their ability to participate in or benefit from this program. The *CFDA* description of this program is available on line at www.cfda.gov/public/viewprog.asp?progid=1083

20. The fifteenth of the 22 federal grants received by ODRC is a grant pursuant to the Carl D. Perkins Act. Although that grant involves federal funds, it is a pass-through grant from ODE, and ODE is therefore the grantor. ODE's individualized statement of the purpose of those federal funds is "to support modernization efforts and equipment purchases." ODRC has used those funds exclusively to purchase hard assets for its educational activities. I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or actions interfered with their ability to participate in or benefit from t s program. See Exhibit 7 hereto.

21. The sixteenth of the 22 federal grants received by ODRC as of September 22, 2000, was a grant received pursuant to the Omnibus Crime Control and Safe Streets Act that was used to assist offenders in finding jobs upon release. This grant ended in the year 2000 and is no longer active. Further, all of the funds received pursuant to this grant were awarded and received prior to September 22, 2000, although some of those funds were spent by ODRC after that date.

22. The seventeenth and eighteenth of the 22 federal grants received by ODRC are grants for substance abuse treatment. The *CFDA* describes the objective of this program as "assist[ing] the states . . . [to] develop and implement residential substance abuse treatment programs." That is how ODRC has used those funds. I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or actions interfered with their ability to participate or benefit from this program. The *CFDA* description of this program is available on line at www.cfda.gov/public/viewprog.asp?progid=541

23. The nineteenth and twentieth of the 22 federal grants received by ODRC are funds disbursed under a separate grant for drug treatment programming. According to the *CFDA* those "[f]unds may be used to provide additional personnel, equipment, facilities (including upgraded and additional Law Enforcement Crime Laboratories), personnel training and equipment for more widespread apprehension, prosecution and adjudication of persons who violate State and local laws relating to the production, possession and transfer of Controlled Substances and to improve the Criminal Justice System." ODRC uses those to pay for Wright State University's development and delivery of drug treatment programming. I have received no reports of prisoners' religious activities or status in any way impeding the operation of this program. Similarly, I am aware of no instances where prisoners' religious beliefs or actions interfered with their ability to participate or benefit from this program. The *CFDA* description of this program is available on line at www.cfda.gov/public/viewprog.asp?progid=530

24. The twenty-first of the 22 federal grants received by ODRC is a crime victims' assistance grant made

pursuant to the Victims of Crime Act. Those funds are used exclusively to assist crime victims, and inmates are in no way affected by this grant.

25. The twenty second of the 22 federal grants received by ODRC is a grant from the Social Security Administration to compensate ODRC for time ODRC employees spend determining.which inmates are receiving Social Security benefits while in custody. This grant does not fund programming but simply reimburses ODRC for administrative expenses.

26. The documents attached as exhibits 1 through 7, inclusive, to this affidavit are true and accurate copies of the originals. The originals of those documents are records of ODRC setting forth the activities of ODRC and are kept in the ordinary course of ODRC's business. Copies of those documents were provided to counsel for the Plaintiffs in *Miller v. Wilkinson,* Case no. C2-98-275 (S.D. Ohio) and *Gerhardt v. Wilkinson,* Case No. C2-95-517 (S.D. Ohio) in January of 2001, as were copies of all CFDA descriptions of the grants described herein.

Further affiant sayeth naught.

/s/ Horst Gienapp
Horst Gienapp

Sworn to before me and subscribed in my presence this 12th day of April, 2001.

[SEAL]

/s/ Lynn A. Thompson
Notary Public

LYNN A. THOMPSON
Notary Public, State of Ohio
My Commission Expires Feb. 26, 2003

Exhibit 1

[SEAL] U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS ☒ OJP ☐ BJA ☐ OJJDP ☐ BJS ☐ NIJ ☐ OVC CHECK APPROPRIATE BOX	**GRANT MANAGER'S MEMORANDUM, PT. 1: PROJECT SUMMARY** ☒ GRANT ☐ COOPERATIVE AGREEMENT PROJECT NUMBER 95-SC-LX-0036

☐ This project is supported under Title I of the Omnibus Crime Control and Safe Streets Act, 42 USC 3701, as amended.

☐ This project is supported under the Juvenile Justice and Delinquency Prevention Act of 1974, as amended.

☒ Other: Violent Crime Control and Law Enforcement Act of 1994, 42.U.S.C. 13701 ET. SEQ

1. STAFF CONTACT
(Name, address & telephone number)
Ruth Cashmere, Program Specialist
Bureau of Justice Assistance
633 Indiana Avenue
Washington, DC 20531
(202) 307-3756

2. PROJECT DIRECTOR
(Name, address & telephone number)
Horst E. Gienapp
Ohio Department of Rehabilitation and Correction
1050 Freeway Drive North
Columbus, OH 43229-0000
(614) 752-1636

3a. TITLE OF THE PROGRAM
FY 1995 Corrections Boot Camp Initiative

3b. POMS CODE (SEE INSTRUCTIONS ON REVERSE)

4. TITLE OF PROJECT
Boot Camp Construction Initiative

5. NAME & ADDRESS OF GRANTEE
Ohio Department of Rehabilitation and Correction
1050 Freeway Drive North
Columbus, OH 43229-0000

6. NAME & ADDRESS OF SUBGRANTEE

7. PROGRAM PERIOD
FROM: 9/01/95 TO: 08/31/97

8. BUDGET PERIOD
FROM: 09/01/95 to: 08/31/97

9. AMOUNT OF AWARD
$1,736,164.00

10. DATE OF AWARD
September 30, 1995

11. SECOND YEAR'S BUDGET
N/A

12. SECOND YEAR'S BUDGET AMOUNT
N/A

13. THIRD YEAR'S BUDGET PERIOD.
N/A

14. THIRD YEAR'S BUDGET AMOUNT
N/A

15. SUMMARY DESCRIPTION OF PROJECT
(See instruction on reverse)

Funding is requested by the Ohio Department of Rehabilitation and Correction to design, develop, and implement a boot camp program for nonviolent inmates ages 18-30 employing a "therapeutic community approach to treating chemically dependent offenders." The initiative is compatible with department strategy "to manage prison crowding by expanding alternative forms of incarceration and community sanction options." A 125 bed facility is planned to complement the state's Shock Incarceration Program consisting of 2 boot camps (1 for males, the other for females) with a fourth project, a life skills camp, in the planning stage.

Boot camp participants will be processed through a three-phase program. Phase I consisting of 60 days institution-based military drill and substance abuse treatment; Phase II, 60 days placement in community-based halfway house with job and life skills training; Phase III, six months of supervised transition phase with continued emphasis on drug counseling and treatment completes the program cycle. The department projection targets 750 prison beds freed up for violent offenders when the four boor [sic] camp sites are fully operational.

A site plan for the boot camp facility shows space requirements for a self-contained physical plant with open dormitories, class rooms, office space and support service areas. Grant funds will be used for site improvements and interior exterior construction costs.

ca/ncf

Exhibit 2

[SEAL] U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS ☐ OJP ☐ BJA ☐ OJJDP ☐ BJS ☒ NIJ ☐ OVC CHECK APPROPRIATE BOX	**GRANT MANAGER'S MEMORANDUM, PT. 1: PROJECT SUMMARY** ☒ GRANT ☐ COOPERATIVE AGREEMENT PROJECT NUMBER 1999-FS-VX-0003

☒ This project is supported under Title I of the Omnibus Crime Control and Safe Streets Act, 42 USC 3701, as amended.

☐ This project is supported under the Juvenile Justice and Delinquency Prevention Act of 1974, as amended.

☐ Other:

1. STAFF CONTACT
(Name, address & telephone number)
Rebecca Childress
National Institute of Justice
810 7th Street, NW
Washington, DC 20531,
(202) 307-0200

2. PROJECT DIRECTOR
(Name, address & telephone number)
Horst E. Gienapp
100 Freeway Drive North
Columbus, OH 43229
(614) 752-1636

3a. TITLE OF THE PROGRAM
Correctional Law Enforcement Family Support

3b. POMS CODE (SEE INSTRUCTIONS ON REVERSE)

4.	TITLE OF PROJECT Reducing Correctional Officer and Family Stress in Ohio through Organizational Interventions
5.	NAME & ADDRESS OF GRANTEE Ohio Department of Rehabilitation and Correction 1050 Freeway Drive North Columbus, OH 43229
6.	NAME & ADDRESS OF SUBGRANTEE
7.	PROGRAM PERIOD FROM: 1/01/2000 TO: 06/30/2001
8.	BUDGET PERIOD FROM: 1/01/2000 TO: 06/30/2001
9.	AMOUNT OF AWARD $100,000.00
10.	DATE OF AWARD September 30, 1999
11.	SECOND YEAR'S BUDGET N/A
12.	SECOND YEAR'S BUDGET AMOUNT N/A
13.	THIRD YEAR'S BUDGET PERIOD N/A
14.	THIRD YEAR'S BUDGET AMOUNT N/A

15.	SUMMARY DESCRIPTION OF PROJECT (See instruction on reverse) This hypothesis-based project proposes to implement a comprehensive stress reduction program for corrections officers in five Ohio corrections facilities and their families. This program will include mentoring for new probationary officers, an alternative dispute resolution program, a family orientation program, an employee family informational services hot line and website, and a post-investigation debriefing policy. Qualitative and quantitive methods will be used to collect process and outcome information of each component at each of the five institutions. The evaluation will be conducted by Ohio University, College of Arts and sciences CA/NCF

Exhibit 3

[SEAL] U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS ☐ OJP ☐ BJA ☐ OJJDP ☐ BJS ☒ NIJ ☐ OVC CHECK APPROPRIATE BOX	**GRANT MANAGER'S MEMORANDUM, PT. 1: PROJECT SUMMARY** ☒ GRANT ☐ COOPERATIVE AGREEMENT PROJECT NUMBER 98-CE-VX-0019

☒ This project is supported under Title I of the Omnibus Crime Control and Safe Streets Act, 42 USC 3701, as amended.

☐ This project is supported under the Juvenile Justice and Delinquency Prevention Act of 1974, as amended.

☐ Other: Violent Crime Control and Law Enforcement Act of 1994, 42.U.S.C. 13701 ET. SEQ
1. STAFF CONTACT (Name, address & telephone number) Laura Winterfield National Institute of Justice 810 7th Street NW Washington, DC 20531 (202) 616-3482
2. PROJECT DIRECTOR (Name, address & telephone number) Horst E. Gienapp Ohio Dept. of Rehabilitation and Correction 1050 Freeway Drive North Columbus, OH 43229-0000 (614) 752-1636
3a. TITLE OF THE PROGRAM
3b. POMS CODE (SEE INSTRUCTIONS ON REVERSE)
4. TITLE OF PROJECT Examining the Effects of Ohio's "Truth-in-Sentencing" Reforms on Inmate Institutional Behavior
5. NAME & ADDRESS OF GRANTEE Ohio Dept. of Rehabilitation and Corrections 1050 Freeway Drive North Columbus, OH 43229
6. NAME & ADDRESS OF SUBGRANTEE
7. PROGRAM PERIOD FROM: 01/01/99 TO: 12/01/00

8. BUDGET PERIOD FROM: 01/01/99 TO: 12/01/00
9. AMOUNT OF AWARD $117,570.00
10. DATE OF AWARD September 30, 1998
11. SECOND YEAR'S BUDGET N/A
12. SECOND YEAR'S BUDGET AMOUNT N/A
13. THIRD YEAR'S BUDGET PERIOD N/A
14. THIRD YEAR'S BUDGET AMOUNT N/A
SUMMARY DESCRIPTION OF PROJECT (See instruction on reverse) The proposed project will examine the impact of Ohio's new sentencing reform measures on inmate behavior within the institutional setting. The goals of the project are to: (1) assess the impact of Ohio's Truth in Sentencing reform bill on institutional behavior; (2) determine the consequences of eliminating positive incentives to inmates; (3) determine the consequences of implementing a "bad time" policy on inmate institutional behavior; and (4) provide the Ohio Department of Rehabilitation and Correction with policy recommendations based on research findings related to institutional management issues. The proposed research will employ a quasi-experimental design. Subjects of the study will be three admissions cohorts. Group one represents institutional

behavior prior to sentencing reform, and all data for this group will be collected at one point in time. Group two represents both pre-and post-sentencing reform impact on behavior, and group three represents institutional behavior after the enactment of sentencing reform. Utilizing a repeated measures analysis of variance design, our study will examine whether the effects of these reform measures impact institutional behavior over time, controlling for a number of relevant confounding factors. ca/ncf

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EXHIBIT 4

16.606 State Criminal Alien Assistance Program (SCAAP)

FEDERAL AGENCY:

OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE, DEPARTMENT OF JUSTICE

AUTHORIZATION:

Omnibus Appropriations Act, Public Law 106-113, Division B, Section 1000(a); Immigration and Nationality Act, 8 U.S.C. 1252, Section 242 as Amended; Title II, subtitle C, Section 20301, Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322.

OBJECTIVES:

Provides Federal assistance to States and localities who request it for costs incurred for the incarceration of undocumented criminal aliens convicted of a felony

offense(s) or two or more misdemeanors. Additionally, to better identify undocumented criminal aliens and to expedite the process of transferring illegal aliens from State and local correctional institutions to Federal custody in preparation for deportation.

TYPES OF ASSISTANCE:

None.

USES AND USE RESTRICTIONS:

There are no restrictions on or prescribed use of funds. Funds derived from these payments are available to the applicants or the applicant jurisdictions to use as they see fit, as this is essentially assistance to defray cost previously incurred by jurisdictions for the housing of undocumented criminal aliens. Funds need not be used for correctional purposes or even criminal justice purposes, but may revert to the State or county general fund. This is governed by State law or is at the option of the chief executive officer of the applicant jurisdiction. All that BJA requires is the expeditious draw-down of the payment funds, retention of records for the required audit period (3 years), and information necessary to allow the orderly closeout of the payment, if requested by the grantor agency.

ELIGIBILITY REQUIREMENTS:

Applicant Eligibility: States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands and localities or local jurisdictions exercising authority with respect to the incarceration of an undocumented criminal alien. This would cover State prison facilities (including those housing juveniles convicted as adults of felony offenses or two or more misdemeanors) and local jails, whether operated by counties or cities. Applicants are generally State Department of Corrections and local sheriffs or city jail administrators,

pursuant to designation authority to receive the payment from the chief executive officer of the political entity, e.g., Governor, County Executive, Mayor or City Manager. Note: Only one application is accepted from each separate political division (i.e., State, county, city).

Beneficiary Eligibility: States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands and localities or local jurisdictions.

APPLICATION AND AWARD PROCESS:

Preapplication Coordination: No formal preapplication coordination is required. While informal preapplication coordination is not required, it is encouraged that applicants coordinate with any facilities for which they have responsibility that provide overnight, secured lodging (i.e., incarceration) of undocumented criminal aliens. This program is eligible for coverage under E.O. 12372 "intergovernmental Review of Federal Programs." An applicant should consult the office or official designated as the Single Point of Contact in their respective State for more information on what process the State may require of those applying for assistance.

Application Procedure: The Fiscal Year (FY) 2000 SCAAP application for payment process has been modified from previous fiscal year funding. The SCAAP cycle for FY 2000 will be administered via the Office of Justice Programs Internet-based Grants Management System. Inmate data, including the proper inmate identifiers, will either be manually key-stroked into the on-line application system, or submitted on-line by electronically attaching the applicable portions of their inmate databases. The on-line application process will begin in late February, 2000, and end mid-April, 2000. The INS inmate verification process

will last 30 days, beginning in mid-April 2000, and ending in mid-May, 2000. Requests for Payment (RFP) and monetary drawdowns will begin in June 2000, and end no later than 90 days after the date the payment process becomes available. Technical assistance is available to applicants for preparation of the on-line application process by calling the OJP Grants Management System Hotline at 1-888-549-9901.

Award Procedure: The final payment process requires that all applications and all data be fully processed and verified before any payments are made. Inmate data will be verified by the Immigration Naturalization Service (INS). INS will attempt to match the inmate data records provided to records in its databases to obtain the maximum number of confirmed matches. These matches are expected to include three categories: 1) those positively identified (matched) as qualifying undocumented criminal aliens; 2) those who are positively identified (matched) as non-qualifying undocumented criminal aliens within the definitions applicable to SCAAP; and 3) those not positively identified relative to categories 1 or 2.

Applicants will be given credit for a percentage of inmates whose eligibility cannot be determined through positive identification or "match," but have valid foreign countries of birth. Payments will be based on the verified number of aliens incarcerated by each applicant. Payments are granted by the Director of the Bureau of Justice Assistance, Office of Justice Programs, Department of Justice. The payment will be accepted on-line and the acceptance will effect a simultaneous assurance of compliance with conditions.

Deadlines: Applications are due no later than April 15, 2000.

Range of Approval/Disapproval Time: Not applicable.

Appeals: Not applicable.

Renewals: If additional funding for the State Criminal Alien Assistance Program is allocated by Congress, applications can be submitted annually.

ASSISTANCE CONSIDERATIONS:

Formula and Matching Requirements: This program has no statutory formula. Payments are based on the verified number of aliens incarcerated by each applicant and cost considerations which are used to determine relative percentage of total funding each applicant is eligible to receive.

Length and Time Phasing of Assistance: Payments are made within 90 days of application if no data is being verified.

POST ASSISTANCE REQUIREMENTS:

Reports: No reports are required under this payment program.

Audits: Recipients who receive $300,000 or more of Federal funds during their fiscal year are required to submit an organization-wide financial and compliance audit report in accordance with OMB Circular No. A-133, as amended, and as stated in the on-line payment process. Receipt of SCAAP payments is considered in establishing the requirement for an audit under the Single Audit Act.

Records: Financial records, supporting documents, statistical records, a copy of the inmate records submission, and all other records pertinent to a grant shall be retained for a period of at least three years following the closeout of the grant.

FINANCIAL INFORMATION:

Account Identification: 15-0404-0-1-754.

Obligations: (Grants) FY 99 $1,150,650,948; FY 00 est 411,430,000; and FY 01 est $578,852,700.

Range and Average of Financial Assistance: Not available.

PROGAM [sic] ACCOMPLISHMENTS:

This program has assisted States and localities which have requested assistance in defraying the cost incurred for the imprisonment of undocumented criminal aliens, resulting in more than $2.2 billion in SCAAP funds being distributed to approximately 336 State and local applicants in the last 4 years.

REGULATIONS, GUIDELINES, AND LITERATURE:

OJP Financial Guide, OMB Circular No. A-133, and the State Criminal Alien Assistance Program Guidance and Application Kit.

INFORMATION CONTACTS:

Regional or Local Office: None.

Headquarters Office: State Criminal Alien Assistance Program, Office of Justice Programs, Bureau of Justice Assistance, U.S. Department of Justice, 810 Seventh Street, NW., Washington, DC 20531. Contact: Maty Santonastasso, Division Director. Telephone: (202) 305-2088.

Web Site Address: http://www.usdoj.gov.

RELATED PROGRAMS:

None.

EXAMPLES OF FUNDED PROJECTS:

Not applicable.

CRITERIA FOR SELECTING PROPOSALS:

Awards will be made on a pro rata share of the average costs of incarceration of a prisoner in the relevant State or locality for verified criminal aliens, based on three factors: 1) the applicant's number of qualifying undocumented criminal aliens; 2) an average length of incarceration; and, 3) the applicant's daily average cost per inmate. Total claims for all applicants will be divided into the available appropriation and each applicant will receive an equivalent percentage payout ("cents on the dollar"). Assistance is contingent on applicants meeting all of the above criteria, and there is no federal obligation until claims have been fully certified. As this amount is NOT expected to meet all claims, each applicant will receive only partial payment of their total request.

Exhibit 5

[SEAL] U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS ☒ OJP ☐ BJA ☐ OJJDP ☐ BJS ☐ NIJ ☐ OVC CHECK APPROPRIATE BOX	**GRANT MANAGER'S MEMORANDUM, PT. 1: PROJECT SUMMARY** ☒ GRANT ☐ COOPERATIVE AGREEMENT PROJECT NUMBER 96-CV-VX-0039 S-07
☐ This project is supported under Title I of the Omnibus Crime control and Safe Streets Act, 42 USC 3701, as amended.	

☐ This project is supported under the Juvenile Justice and Delinquency Prevention Act of 1974, as amended.	
☒ Other: Violent Crime Control and Law Enforcement Act of 1994, as amended, Pub. L. 103-322	
1.	STAFF CONTACT (Name, address & telephone number) Thomas Mason, Grant Manager OJP, Corrections Program Office 810 7th Street, N.W. Washington, DC 20531 (800) 848-6325
2.	PROJECT DIRECTOR (Name, address & telephone number) Horst E. Gienapp, Grants Chief Ohio Department of Rehabilitation and Correction 1050 Freeway Drive North Columbus, OH 43229 (614) 752-1636
3a.	TITLE OF THE PROGRAM FY 1999 Violent Offender Incarceration/Truth-In-Sentencing Incentive Grant Program
3b.	POMS CODE (SEE INSTRUCTIONS ON REVERSE)
4.	TITLE OF PROJECT Ohio FY 1999 VOI/TIS Supplement
5.	NAME & ADDRESS OF GRANTEE Ohio Department of Rehabilitation and Correction 1050 Freeway Drive North Columbus, OH 43229
6.	NAME & ADDRESS OF SUBGRANTEE
7.	PROGRAM PERIOD FROM: 9/30/1996 TO: 09/29/2004

8.	BUDGET PERIOD FROM: 09/30/1996 TO: 09/29/2004
9.	AMOUNT OF AWARD $12,143,169.00
10.	DATE OF AWARD September 16, 1999
11.	SECOND YEAR'S BUDGET N/A
12.	SECOND YEAR'S BUDGET AMOUNT N/A
13.	THIRD YEAR'S BUDGET PERIOD N/A
14.	THIRD YEAR'S BUDGET AMOUNT N/A
15.	SUMMARY DESCRIPTION OF PROJECT (See instruction on reverse) This award represents a supplement to the fourth year of funding in the Violent Offender Incarceration/Truth-In-Sentencing Incentive Grant Program (VOI/TIS). The program assists states in developing additional capacity for violent offenders through construction or lease of prison beds. Beginning this year, up to 10 percent of supplemental grant awards may be used for drug testing and interventions. The Ohio Department of Rehabilitation and Correction (ODRC) will use grant funds to continue the programs listed below. To date, Ohio has received $44,525,109 in VOI/ITS funding, which is being

used to partially finance the following nine projects: 1) construction of a 369-bed housing unit at the Richland Correctional Institution; 2) construction of a 500-bed DUI center at the North Coast Treatment Facility; 3) planning for a new 240-bed dormitory at the Belmont Correctional Institution; 4) renovation of the Clermont County Jail by adding 11 beds; 5) 75-bed expansion of the Lake County Jail; 6) renovation of the Muskingum County Jail by adding 22 beds; 7) construction of a new 40-bed jail facility for Jackson County; 8) leasing of 16 juvenile beds by the Ohio Department of Youth Services (ODYS); and 9) leasing of 30 serious female offenders beds by the ODYS. More information is needed about the conversion of the CCI warehouse before it can be approved as a potential VOI/TIS project. The ODRC does not currently have plans to use award funds for drug testing and interventions.

nca/ncf

EXHIBIT 6

PART 3A

OHIO DEPARTMENT OF EDUCATION
OFFICE OF CAREER-TECHNICAL
AND ADULT EDUCATION

ADULT BASIC AND LITERACY EDUCATION
INSTRUCTIONAL GRANT
FY 2001 GENERAL PROGRAM ASSURANCES

ASSURANCES to the Ohio Department of Education regarding application for funds under authority of the Adult Education and Family Literacy Act, Title II of the Workforce Investment Act, P.L. 105-220. The applicant hereby assures the Ohio Department of Education that:

1. The information contained in this application is correct and accurate to the best knowledge of the applicant agency.

2. Funds received under this grant program will be used to supplement and not supplant funds already available to the applicant from other non-federal sources for purposes authorized by the Adult Basic and Literacy Education Instructional Grant Program.

3. Funds will be used to provide Adult Education and Literacy Services, in order to: (1) assist adults to become literate and obtain the knowledge and skills necessary for employment and self-sufficiency; (2) assist adults who are parents to obtain the educational skills necessary to become full partners in the educational development of their children; and (3) assist adults in the completion of a secondary school education.

4. Programs, services, and activities supported with funds approved for use in this application will be used to meet or exceed established Core Indicators of Performance and improve the quality of adult education programs, including programs for educationally and economically disadvantaged adults, to initiate new programs of high quality, or, where necessary, to maintain programs.

5. Funds received under this grant application will be expended in accordance with all applicable statutory provisions, including the Adult Education and Family Literacy Act, Title II of the Workforce Investment Act, P.L. 105-220 and according to the provisions of Ohio's approved State Plan for Adult Basic and Literacy Education and the approved local application.

6. The control of funds provided under this title, and title to property derived therefrom, shall be under the authority of the approved applicant agency for the

uses and purposes provided in this title, and that the approved agency will administer such property and funds and apply them only for the purposes for which they are granted. Upon termination of grant support, the entitled agency may reassign grant purchased property to another federally supported program of the agency or transfer title to another agency's ABLE program identified by the Ohio Department of Education.

7. The applicant shall use fiscal control and fund accounting procedures that will ensure proper disbursement and accounting of funds received pursuant to this grant application.

8. The grantee shall keep such records using required reporting forms and provide such information to the Ohio Department of Education and its authorized agents as reasonably may be required for fiscal audit and program evaluation.

9. The applicant will make accurate and current mid-year and annual performance reports, via ABLELink, and such other reports to the Ohio Department of Education. These reports will be in such form and containing such information as may be reasonably necessary to enable the department to perform its duties under this title, including information relating to the educational achievements of adult students. The applicant will keep such records and afford such access thereto as the department and its authorized agents may find necessary to assure the correctness and verification of such reports.

10. Documentation of hours worked will be maintained for all part-time paid employees of the program. In addition, appropriate time distribution records for prorated portions of full-time positions will be kept.

These will be maintained in the district or agency treasurer's office and/or office of the project director.

11. The grantee will not discriminate on the basis of sex, race, color, persons with disabilities, age, and/or national origin in its literacy programs, activities, employment or admission policies and practices, as required by Education Department General Administrative Regulations (EDGAR) 34 CFR Part 75.500.

12. Adults enrolled in programs supported by this grant will not be required to pay tuition, fees, or other charges, nor will they be required to purchase books or other materials needed for participation in the program.

13. The governing board of the applicant agency is in compliance and will continue to comply with the provisions of section 438 of the Rights and Privacy Act, P.L. 93-380.

14. Personnel employed as teachers and instructional aides by public school districts in projects financed under this title will be certificated as required by Section 3319.22, 3319.30, and 3319.088 of the Ohio Revised Code.

15. Personnel or programs financed under this title will not be certified for inclusion in the state foundation program.

16. Project administration shall utilize an advisory committee with representatives from education, government, social services, business and the local community.

17. The project administrator shall attend the Fall & Spring Directors' Meetings and others as determined by the State ABLE Office.

18. If application is being made by a private nonprofit agency, organization, or institution, such applicant has secured a certificate of tax exempt status issued by the U.S. Internal Revenue Service under authority of Section 501(c)(3) of the Internal Revenue Code. In such case, a copy of the tax-exempt certificate is attached (Attachment A) to the application and the agency's tax identification (TI) number has been identified on the cover page of this application. Any subcontractor receiving funds from the grant applicant will also satisfy this same requirement.

19. The filing of this application has been duly authorized by the governing board of the applicant agency, and the indicated representative has been duly authorized by formal action of said board to file this application for, and in behalf of, said agency, and otherwise to act as the authorized representative of the agency in connection with this application. Said authorization was/will be voted and made a part of the minutes in an official meeting of the governing authority held on or will be held on, ___ 2000.

/s/ Jerry [Illegible] — 6/29/00
Signature of Superintendent/ Chief Executive Officer — Date

/s/ [Illegible] — [Illegible]
Signature of the Treasurer/ Chief Fiscal Officer — Date

ALAN TROOPS, ACADEMIC DIRECTOR
Name of Authorized Representative
(If other than Superintendent/ Chief Executive Officer)

/s/ Alan Logan — 6/29/00
Signature of Authorized Representative — Date

EXHIBIT 7

[SEAL] State of Ohio
Department of Education

Susan Tave Zelman
Superintendent of
Public Instruction

Career-Technical and Adult Education
Joanna Kister, Director, 65 South Front Street,
Room 907, Columbus 43215-4183

To: Dr. Jerry McGlone, Superintendent – Ohio Central School System

From: Dwight E. Anstaett, Corrections Consultant – ODE
/s/ Dwight E. Anstaett

RE: Career-Technical and Adult Funding

Date: November 30, 2000

This correspondence is intended to define the sources and permissible uses of Career-Technical and Adult Education funds currently and historically provided through the Ohio Department of Education to the Ohio Central School System.

The Ohio Central School System operates ODE approved Career-Technical and Adult Education programs designed to enhance the employability of inmate students within institutions operated by the Ohio Department of Rehabilitation and Correction. **These programs shall not discriminate against protected classes as defined by applicable state and federal regulations.**

The Ohio Department of Education's Office of Career-Technical and Adult Education oversees the funding and operation of approved Career-Technical programs operated by the Ohio Central School System. State dollars support

unit funding and equipment purchases for secondary and adult programs. In addition, federal dollars are provided through ODE as authorized by the Carl D. Perkins Act to support modernization efforts and equipment purchases. All state and federal funding provided through ODE must be used exclusively to support the operation of approved Career-Technical programs within the Ohio Central School System.

Please contact me if questions arise. Thank you very much.

CC: Mr. Jerry Huffman

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEE HAMPTON, et al.,	:	
Plaintiffs,	:	**CASE NO. C2-97-382**
v.	:	**JUDGE GRAHAM**
REGINALD WILKINSON, et al.,	:	**MAGISTRATE JUDGE ABEL**
Defendants.	:	

NOTICE OF FILING DEPOSITION

Now come Defendants and hereby notify the Court and the Parties that they are filing the excerpts of the June 19, 1996 deposition of Matthew Meyer taken in connection with the case of *Syder, et al v. Voinovich*, Case No. C2-94-536 (S.D. Ohio) quoted in the Defendants' "Memorandum In Support of Partial Motion To Dismiss", filed in this case on November 15 2000 (Doc. No.78).

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

/s/ Todd Marti
TODD MARTI (0019280)
Assistant Attorney General
Corrections Litigation Section
140 East Town Street, 14th Floor
Columbus, OH 43215
(614) 644-7233

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN MILLER, et al.,

Plaintiffs,

v.

REGINALD WILKINSON, et al.,

Defendants.

Case No. 2:98-CV-275
MAGISTRATE JUDGE KEMP

JOHN GERHARDT,

Plaintiff,

v.

ALAN LAZAROFF, et al.,

Defendants.

Case No. 2:95-CV-517
JUDGE SARGUS
MAGISTRATE JUDGE KEMP

LEE HAMPTON, et al.,

Plaintiffs,

v.

REGINALD WILKINSON, et al.,

Defendants.

Case No. 2:97-CV-382
JUDGE GRAHAM

ORDER

(Filed Aug. 4, 2003)

This matter is before the Court on the Plaintiffs' July 10, 2003 Motion to Certify this Court's February 25, 2002 Order upholding the constitutionality of the Religious Land Use and Institutionalized Persons Act ["RLUIPA"], 42 U.S.C. § 2000cc, *et seq.*, for immediate appeal to the

United States Court of Appeals for the Sixth Circuit. The Defendants, including the intervenor, Department of Justice, have no opposition to the motion.

Plaintiffs filed the motion in order "to provide for a firm basis for appellate jurisdiction that will ensure a disposition of the current appeal on its merits." (*Plaintiffs' Motion* at 2). On March 1, 2002, Defendants filed an interlocutory appeal of this Court's February 25, 2002 Order under 28 U.S.C. § 1291. As stated in their present motion, Plaintiffs are uncertain of the Sixth Circuit's jurisdiction over Defendants' appeal and, therefore, ask that the matter be certified for appeal under 28 U.S.C. § 1292(b).

The statute provides, in relevant part:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b).

In this case, the Court first finds that its previous Order upholding the constitutionality of RLUIPA involves a controlling question of law. As the Plaintiffs point out, resolution of the constitutionality of the statute will define the ultimate outcome of these consolidated cases. Furthermore, the Sixth Circuit has yet to decide the issue. The only circuit court to address the matter is the Ninth Circuit, which upheld the statute as a constitutional

exercise of Congress' powers under the Spending Clause. *See Mayweathers v. Newland,* 314 F.3d 1062 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3725 (U.S. May 7, 2003) (No. 02-1655). Two district courts to consider the matter have, however, reached a contrary conclusion. *See Kilaab Al Ghoshujah v. Dept. of Corrections of State of Wisconsin,* 250 F.Supp.2d 1016 (ED. Wis. 2003); *Madison v. Riter,* 240 F.Supp.2d 566 (W.D. Va. 2003). In view of the current state of the law, the Court has little trouble concluding that there exists a substantial ground for disagreement as to the constitutionality of RLUIPA. Finally, the Court finds that an immediate appeal of this Court's February 25, 2003 Order will materially advance the ultimate termination of this litigation. As stated above, the issue of constitutionality of the statute will affect the ultimate disposition of Plaintiffs' claims.

In sum, the Court concludes that all elements of 28 U.S.C. § 1292(b) are satisfied. The Plaintiffs' Motion to Certify this Court's February 25, 2002 Order (**Doc. #279**) is **GRANTED**. The Clerk is **DIRECTED** to immediately certify the February 25, 2002 Order to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1292(b).

IT IS SO ORDERED.

8-4-2003
DATE

/s/
EDMUND A. SARGUS, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JON B. CUTTER, et al.,	:	**CASE NOS. 02-3270**
Plaintiffs-Appellees,	:	**02-3299**
	:	**02-3301**
v.	:	
REGINALD WILKINSON, et al.,	:	
	:	
Defendants-Appellants.	:	

On Appeal From the United States District Court for the Southern District of Ohio, Eastern Division

---

DEFENDANT-APPELLANTS' FINAL OPENING BRIEF

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* * *

[60] close identity to RFRA. They are precisely the types of diversions and costs discussed in *New York* and *Printz*, but they will be borne by the states, not Congress. Further, there will undoubtedly be political costs exacted for using the tax dollars of Ohio's African-American, Hispanic, and Asian citizens to accommodate Plaintiffs' "religious" expression, expression that advocates the disenfranchisement, if not the outright extermination, of Ohio's racial minorities. "[I]t will likely be [state elected officials], not some federal official, who will be blamed for" such a patently offensive use of public resources.[188]

[188] *Printz*, 521 U.S. at 930.

New York and *Printz* establish that Congress cannot compel states to affirmatively regulate in accordance with federal policy choices. RLUIPA does exactly that, regulating the way states regulate one of the most highly regulated aspects of their internal operations. Moreover, it does so in a way that will force the states to absorb the costs of the regulatory regime it has imposed. It is hard to imagine a more flagrant violation of federalism.

VIII. CONCLUSION

The Defendants ask this court to reverse the decision below and to remand these cases with instruction to dismiss Plaintiffs' RLUIPA claims.

Case No: 02-3270: 02-3299: 02-3301

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Sep. 23, 2003)

JON B. CUTTER; J. LEE HAMPTON;

Plaintiffs – Appellees

UNITED STATES OF AMERICA

Intervenor – Appellee

v.

REGINALD WILKINSON; DAVID SCHWARTZ; NICHOLAS G. MENEDEZ; L. C. COVAL; K. L. BROWN; GEORGE D. ALEXANDER; DIANNE WALKER; JIM ERWIN; RON CARNEIN; RUDY PRINGLE; WALTER LOWERY

Defendants – Appellants

Upon consideration of the joint petition for leave to appeal,

It is ORDERED that the petition for leave to appeal is granted.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green/tnb
Leonard Green, Clerk

Nos. 02-3270/3299/3301

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JON B. CUTTER, ET AL., Plaintiffs-Appellees, UNITED STATES OF AMERICA, Intervenor-Appellee, v. REGINALD WILKINSON, ET AL., Defendants-Appellants.	)	ORDER

(Filed Mar. 3, 2004)

BEFORE: MOORE and GILMAN, Circuit Judges; and TARNOW,* District Judge.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

---

* Hon. Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

42
2421

(5)

No. 03-9877

Supreme Court, U.S.
FILED
DEC 20 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

JON B. CUTTER, et al.,

Petitioners,

vs.

REGINALD WILKINSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR PETITIONERS

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Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Congress violated the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act of 2000 which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control.

LIST OF PARTIES

Petitioners in this consolidated case are:

Jon Cutter

Darryl Blankenship

David Dattilo

John Gerhardt

Rick Hall

Lee Hampton

Jeffrey Holland

Roy Howington

William LeMasters

John Miller

Fred Schocke

Matthew Stump

Respondents are officials of the Ohio Department of Correction and Rehabilitation:

Reginald Wilkinson [Director]

George Alexander

K. L. Brown

Ron Carnein

June Coleman

Terry Collins

LIST OF PARTIES – Continued

L. C. Coval

Jim Erwin

Rev. Charles Griffin

Cheryl Hart

Allan Lazaroff

William Lowery

Nicholas Menedes

Rita Panzone

Rudy Pringle

Rev. David Schwartz

Rick Stallins

Jack Taylor

Chad Van Sickle

Diane Walker

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App. A1-A8) is reported at 349 F.3d 257. The opinion of the District Court (Pet. App. B1-B18) which adopted and included the Report and Recommendation of the Magistrate Judge (Pet. App. B5-B18) is reported at 221 F. Supp. 2d 827.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 2003, and a timely petition for rehearing and rehearing *en banc* was denied on March 3, 2004. Pet. App. A1. The petition for a writ of certiorari was filed on April 19, 2004, and was granted on October 12, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Establishment Clause of the First Amendment to the Constitution provides in relevant part, "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

The Spending Clause of the Constitution provides in relevant part, "The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

The Commerce Clause of the Constitution provides in relevant part, "The Congress shall have Power To regulate Commerce . . . among the several states . . . ." U.S. CONST. art. I, § 8, cl. 3.

The relevant provisions of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq.*), are reproduced in the appendix to this brief at App. 1a-15a.

STATEMENT OF THE CASE

Petitioners, present and former inmates of the Ohio Department of Rehabilitation and Correction (ODRC), are plaintiffs in three consolidated cases brought to challenge burdens that ODRC Respondent prison officials imposed on Petitioner inmates' religious activities. Petitioners are, or have been, incarcerated at ODRC[1] and are adherents of unrelated, nonmainstream religions. They sued Respondents, individually and in their official capacities, for injunctive and other relief under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, 42 U.S.C. 2000cc *et seq*. Section 3 of the Act provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(1), (2).[2] Petitioner inmates also sued under the First and Fourteenth Amendments pursuant to 42 U.S.C. § 1983. In the proceedings below, the Court of Appeals for the Sixth Circuit

[1] Petitioners Cutter and Gerhardt were released from custody after their suits were filed and are no longer Ohio Department of Correction and Rehabilitation inmates. Each sought injunctive and other relief. Petitioners Hampton, Miller, and Blankenship are still at the ODRC.

[2] RLUIPA was enacted following this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which invalidated the provisions of the Religious Freedom Restoration Act as applied to the States.

held that RLUIPA is unconstitutional on its face because it violates the Establishment Clause.

A. The Proceedings Below

Petitioners filed separate, *pro se* complaints in 1995, 1997, and 1998 to challenge the withholding of religious publications and ceremonial items ordered from publishers or vendors outside of Ohio, denial of access to religious services, and other burdens placed on their religious activities. *Hampton v. Wilkinson*, No. C2-97-382; *Miller v. Wilkinson*, No. C2-98-275; *Gerhardt v. Lazaroff*, No. C2-95-517. Initially, their complaints alleged violations of the First and Fourteenth Amendments. However, following September 22, 2000, RLUIPA's effective date, Petitioners amended their respective complaints to include RLUIPA claims. J.A. 42, 113, 125. Respondents moved to dismiss on the ground that RLUIPA is unconstitutional.

Petitioners' cases were consolidated before District Judge Edmund A. Sargus for the limited purpose of ruling on RLUIPA's constitutionality. Respondents filed their Consolidated Partial Motions to Dismiss pursuant to FED.R.CIV.P. 12(b)(6) on the ground that RLUIPA is unconstitutional on its face and in every application because it violates the Establishment Clause and exceeds Congress' powers under the Spending and Commerce Clauses. Judge Sargus referred the Respondents' consolidated motion to Magistrate Judge Terence P. Kemp for a Report and Recommendation. The United States intervened to defend RLUIPA's constitutionality pursuant to 28 U.S.C. § 2403(a).

On August 27, 2001, Magistrate Judge Kemp filed a Report and Recommendation finding the Act to be constitutional on its face. Pet. App. B5. He ruled that RLUIPA did not violate the Establishment Clause because, among other things, the government is permitted "to alleviate

significant governmental interference" with religion. Pet. App. B14 (internal citation omitted). Magistrate Judge Kemp also found that Congress had the authority to enact RLUIPA pursuant to the Spending Clause. He did not rule on Respondents' claim that Congress lacked authority to enact RLUIPA under the Commerce Clause.

Respondents filed objections to the Report and Recommendation, but on February 25, 2002, District Judge Sargus filed an opinion and order overruling the objections and adopting the Report and Recommendation. He held that RLUIPA did not violate the Establishment Clause because the government's decision to lift burdens on the free exercise of religion "is not tantamount, by itself, to an unconstitutional endorsement of religion." Pet. App. B4. He also held that RLUIPA is a valid condition on the expenditure of funds under the Spending Clause. He declined to rule on Respondents' Commerce Clause challenge because "any opinion on the Commerce Clause issue would be an advisory opinion." Pet. App. B4. He certified his order for appeal on August 4, 2003. J.A. 363. A joint petition for leave to appeal under 28 U.S.C. § 1292(b) was granted by the Court of Appeals on September 23, 2003. J.A. 368.

On November 7, 2003, the Sixth Circuit Court of Appeals reversed, holding that RLUIPA violates the Establishment Clause because it "has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights." Pet. App. A5. The Sixth Circuit found it unnecessary to decide other issues concerning RLUIPA's facial validity. A petition for rehearing and rehearing *en banc* was denied on March 3, 2004.

Petitioners filed their petition for writ of certiorari on April 19, 2004, and the petition was granted on October 12, 2004.

B. The Facts

Petitioner inmates are members of four distinct religions. ODRC Respondents have stipulated for purposes of the Petitioners' lawsuits that Petitioners are members of *bona fide* religions and that they are sincere in their beliefs. Pet. App. 5; J.A. 185.[3] Petitioners Cutter and Hampton are plaintiffs in *Hampton v. Wilkinson*. Hampton is a member of the Wicca religion. According to the ENCYCLOPEDIA OF AMERICAN RELIGIONS, the Wicca religion "is polytheistic, finding its pantheon in various European pre-Christian nature religions. Many of its adherents believe that the world can be manipulated by magic."[4] Cutter is a member of the Satanist religion. J.A. 47. According to MERRIAM-WEBSTER'S ENCYCLOPEDIA OF WORLD RELIGIONS, the Satanist religion emerged as a protest against Judeo-Christian spiritual hegemony.[5]

Petitioners Hampton and Cutter allege, among other things, that ODRC officials refused to allow them to purchase and possess certain religious books and ceremonial items obtainable only in interstate commerce. J.A. 50-57. These books include: WICCA – THE ANCIENT WAY, published by Illuminet Press, Lilburn, Georgia; THE

[3] Although only the facial validity of RLUIPA is before this Court, ODRC Respondents' memoranda and briefs in the Courts below made factual assertions that Petitioner inmates will contest on remand, in addition to asserting their First and Fourteenth Amendment claims.

[4] J. GORDON MELTON, ENCYCLOPEDIA OF AMERICAN RELIGIONS 167 (6th ed. 1999).

[5] MERRIAM-WEBSTER'S ENCYCLOPEDIA OF WORLD RELIGIONS 971 (1999).

RITUAL BOOK OF MAGIC, published by Samuel Weiser, Inc., New York; and OF WITCHES published by Samuel Weiser, Inc., York Beach, Maine. J.A. 50, 281-83.

Petitioners John Miller and Darryl Blankenship, plaintiffs in *Miller v. Wilkinson*, are adherents of the Asatru religion. They sue individually and on behalf of others similarly situated. Their complaint alleges that they are believers in the ancient Teutonic/Norse religion of Asatru. J.A. 13-14. Asatru is a polytheistic religion that originated in Northern Europe.[6] In the courts below, Respondents claimed that the Asatru religion has connections with a myriad of white supremacist movements engaged in unlawful activities outside of prison. This claim is not relevant to RLUIPA's validity, and will be challenged on remand.

Respondents have refused to allow Asatru inmates to purchase religious books including RUNELORE by Edred Thorson, published by Samuel Weiser, Inc., York Beach, Maine. J.A. 281. Asatru Petitioners also allege that Respondents have refused to permit members of the Asatru religion to purchase or possess religious medallions, altar cloths, and other ceremonial items. J.A. 29-30. All of these items must be obtained from vendors outside of Ohio. J.A. 265.

Petitioner John Gerhardt, plaintiff in *Gerhardt v. Lazaroff*, is a member of the Church of Jesus Christ Christian. J.A. 117. He is an ordained minister of the Christian Identity Church whose beliefs are based on the Bible. He believes that the Bible requires separation of the races. J.A. 117-18. Respondents refused to allow Petitioner

[6] Asatru Folk Assembly, Frequently Asked Questions about Asatru, *at* http://www.runestone.org/flash/faq/index.html (last visited Dec. 11, 2004)).

Gerhardt to receive issues of a religious periodical entitled THE WAY, published in Idaho, and denied him group religious worship with others of the same religion. J.A. 118.

C. ODRC's Federal Funding

The amount of money received by the Ohio Department of Rehabilitation and Correction from the federal government, as of RLUIPA's effective date, represented less than one percent of the ODRC's total budget. ODRC Cir. Br. 18. During 2001, ODRC received $25,545,892 in federal grants,[7] had a total budget of $1,587,724,137,[8] and, according to public records, the total budget of the State of Ohio for the same year was $40,864,100,000.[9] Accordingly, federal funding for corrections that year was approximately 1.61% of the total ODRC budget and .063% of the total state budget. The federal grant to the ODRC from the "Violent Offender and Truth in Sentencing Program" for the twelve-month period starting after September 16, 1999, was $12,143,169. J.A. 246. Respondents received these and other grants during 2000 and 2001, including a $1.7 million Intensive Confinement Construction, J.A. 244, as well as Federal School Breakfast and Lunch Programs grants for meals given to young offenders under 21 years of age. J.A. 248. The parties have stipulated that the ODRC expects to receive money from these programs as long as Congress continues to appropriate funds for them. J.A. 320-323. According to the ODRC budget, funding from its Truth-in-Sentencing grant is estimated to be $24,604,000

[7] J.A. 243.

[8] *Id.*

[9] State of Ohio Executive Budget for FY 2004-05, Actual and Estimated Revenues, *available at* http://www.obm.ohio.gov/information/budget/Bluebook0405/pdf/c_revtbl.pdf (last visited Dec. 11, 2004).

for FY 2004.[10] The combined funding expected to be received by the ODRC from all federal sources is estimated to be $35,363,000 for FY 2004.[11] The total ODRC budget for FY 2004 is $1,631,242,000,[12] and the total state budget for FY 2004 is $47,988,400,000.[13]

SUMMARY OF THE ARGUMENT

I. THE ESTABLISHMENT CLAUSE. This Court's decisions have approved statutory accommodations of religious exercise, lifting burdens the government imposes on religious exercise, even when those burdens do not violate the Establishment Clause or the Free Exercise Clause. Moreover, this Court has invited legislatures to accommodate religious exercise, if they choose, by exempting religious exercise from burdens that are incidental to otherwise valid laws or regulations.

RLUIPA does just that and no more: it lifts substantial government burdens placed on religious exercise of prison inmates. It does not have the purpose or effect of favoring religious exercise over secular activities or providing gratuitous benefits to religion. Because RLUIPA is

[10] State of Ohio Department of Rehabilitation and Correction Budget for FY 2004–05, *available at* http://obm.ohio.gov/information/budget/Bluebook0405/pdf/e_drc.pdf (last visited Dec. 11, 2004). It was stipulated by the parties in the district court that the Respondents were receiving grants under the Truth in Sentencing Grants program at the time their consolidated motion to dismiss was filed. J.A. 320-22. It was also stipulated that Respondents believed the grants would continue to be renewed until the program expired. *Id.*

[11] State of Ohio Department of Rehabilitation and Correction Budget for FY 2004-05, *available at* http://obm.ohio.gov/information/budget/Bluebook0405/pdf/e_drc.pdf (last visited Dec. 11, 2004).

[12] *Id.*

[13] *See supra* note 9.

confined to lifting burdens on religious exercise, it does not involve the government in religious exercise, give benefits to religion, or prefer one religion over another. It merely permits individuals to engage in religious activities that government burdens would otherwise prevent. Therefore, RLUIPA does not have an impermissible purpose or effect that violates the Establishment Clause.

The fact that RLUIPA accommodates religious exercise without simultaneously accommodating all other constitutional rights does not change the analysis. This Court has never held that for the government to accommodate religious exercise, it must simultaneously accommodate all other constitutional rights. It has squarely rejected such a position – which indeed would require invalidation of widely approved and routine accommodations of religious exercise.

RLUIPA does not impose impermissible burdens on third parties. The Act is flexible because it does not require religious exercise to be automatically accommodated. RLUIPA only requires accommodation on a case-by-case basis when a burden on religion is substantial, is not justified by a compelling governmental interest, and is not the least restrictive means to protect that interest. The fact that prison officials must spend time and resources accommodating religious exercise of nonmainstream religions is not the type of burden on third parties that the Establishment Clause recognizes.

A federalist reading of the Establishment Clause giving the states power to define religious accommodations in a way that invalidates RLUIPA would permit the states to selectively accommodate religion in violation of Establishment Clause principles. It would also be completely incompatible with this Court's decisions incorporating and

applying the Free Exercise and Establishment Clauses to the states through the Fourteenth Amendment.

II. THE SPENDING CLAUSE. This Court should not address ODRC Respondents' constitutional challenges to RLUIPA under the Spending or Commerce Clauses. The Court of Appeals decided neither of these questions and the District Court did not decide the Commerce Clause question. As a general rule, this Court generally avoids deciding important questions not decided in the courts below. Moreover, the Court does not have the benefit of a complete factual record addressing Petitioner inmates' claims.

In any event, RLUIPA is valid under the Spending Clause because it imposes a constitutionally permissible condition on ODRC Respondents' receipt of federal funds. First, RLUIPA serves the general welfare by lifting government burdens on religious exercise and enhancing prospects for inmate rehabilitation. Second, the Act clearly notifies recipients of the conditions imposed on their receipt of federal funds. Third, RLUIPA is reasonably related to the purposes of the ODRC's federal funding grants, which include improving the quality of corrections and enhancing inmate prospects for rehabilitation. And, fourth, there is no independent constitutional bar to RLUIPA because the Act does not violate the Establishment Clause.

III. THE COMMERCE CLAUSE. It is also premature for this Court to decide whether RLUIPA violates the Commerce Clause because the Act contains a jurisdictional element. The jurisdictional element requires case-by-case determinations as to whether particular burdens on religious exercise substantially affect interstate commerce. There has been no district court determination as to whether the jurisdictional element has been satisfied.

Moreover, Congress has power under the Commerce Clause to enact RLUIPA to lift burdens on religious exercise that actually or substantially affect interstate commerce. Petitioner inmates have alleged, among other things, that Respondents have interfered with and substantially affected interstate commerce by denying Petitioners access to religious books and ceremonial items only available through interstate commerce. Therefore, RLUIPA is constitutional on its face because it can be constitutionally applied.

ARGUMENT

This Court granted the petition for writ of certiorari to presenting the following question: "Whether Congress violated the Establishment Clause by enacting [RLUIPA]. . . . " Petitioners seek review of the Sixth Circuit's holding that § 3 of the Religious Land Use and Institutionalized Persons Act of 2000 is unconstitutional on its face because it violates the Establishment Clause. The holding was based on a novel view of the Establishment Clause neither briefed nor argued by ODRC Respondents. This brief will first address the reasons the Sixth Circuit gave to support its holding. It will then address Respondents' Establishment Clause arguments in the courts below. Finally, it will address the ODRC Respondents' alternative grounds for affirmance.

I. RLUIPA IS VALID ON ITS FACE BECAUSE IT DOES NOT ESTABLISH RELIGION

A. Legislative Accommodation Of Religion Has Long Been Approved By This Court

Legislative accommodation of religious exercise has long been approved by this Court. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*

v. Amos, 483 U.S. 327, 338 (1987) (government may enact legislation that lifts governmental burdens on religion); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (opinion of Souter, J.) ("Religion clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"); *id.* at 716 (O'Connor, J., concurring) ("The Constitution permits '*non-discriminatory* religious-practice exemptions' . . . ."); *id.* at 723 (Kennedy, J., concurring) (quoting *County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989)) ("Government policies of accommodation . . . are an accepted part of our political and cultural heritage"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 21 (1989) (permissible accommodation is not limited to what is required by Free Exercise Clause); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987) (". . . the government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause"); *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970) (". . . there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference"); *Locke v. Davey*, 124 S. Ct. 1307, 1315, n.8 (2004) (noting favorably that a state constitution provides greater scope for accommodation than that required by federal Constitution). Both Congress and state legislatures often act on these holdings, including RLUIPA and some 12 states that have adopted legislation similar to RLUIPA.[14]

[14] ARIZ. REV. STAT. ANN. §§ 41-1493 to 41-1493.02; CONN. GEN. STAT. ANN. § 52-571b; FLA. STAT. ANN. §§ 761.01 to 761.05; IDAHO CODE §§ 73-401 to 73-404; 775 ILL. COMP. STAT. ANN. 35/1 to 35/99; MO. ANN. STAT. §§

(Continued on following page)

B. RLUIPA Does No More Than Lift Government Burdens Imposed On Religious Exercise

The Court of Appeals concluded that RLUIPA violates the Establishment Clause because it assumed that an accommodation that singles out religion for distinctive treatment inherently provides a gratuitous special benefit to religion. This assumption is mistaken. RLUIPA provides no gratuitous benefit to religion. It is carefully confined to lifting substantial governmental burdens imposed on private religious activity. This Court specifically approved such accommodations in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987). And, it affirmatively invited such accommodations in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990):

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Id. at 890.

1.302 to 1.307; N.M. STAT. ANN. §§ 28-22-1 to 28-22-5; OKLA. STAT. ANN. tit. 51, §§ 251 to 258; 71 PA. CONS. STAT. ANN. §§ 2401 to 2407; R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4; S.C. CODE ANN. §§ 1-32-10 to 1-32-60; TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 to 110.012; *see also* ALA. CONST. amend. 622, § 5.

1. RLUIPA's Accommodations Of Religious Exercise Lift Government Burdens And Do Not Provide Gratuitous Benefits To Believers

The Sixth Circuit treated RLUIPA as if it granted gratuitous benefits to believers. It does not. By RLUIPA's very language, § 3 only applies when prison officials impose a "substantial burden on the religious exercise" of a prison inmate. And, this Court's decisions in *Amos* and *Smith* explicitly approve legislation like RLUIPA, which accommodates religious exercise by lifting substantial burdens on religious practice.

In *Amos*, a building engineer employed at a gymnasium operated by a church was discharged because he was not a member in good standing. He sued on grounds that his discharge violated Title VII's prohibition against religious discrimination in employment. 42 U.S.C. § 2000e-1. He contended that the blanket statutory exemption from Title VII for religious institutions engaged in religious discrimination violated the Establishment Clause because it singled out religion for special treatment and went well beyond a constitutionally mandated free exercise accommodation.

The *Amos* Court upheld the exemption, reasoning it was a legitimate accommodation of religion because it lifted the burden imposed on religious exercise by Title VII's anti-discrimination provisions. By lifting the burden, the exemption did not sponsor or favor religion because "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Amos*, 483 U.S. at 334 (quoting *Walz*, 397 U.S. at 669). *Amos* also explicitly rejected a claim, similar to that advanced below by Respondents, that the exemption

established religion because it facilitated religious practice by making observance less onerous. "A law is not unconstitutional simply because it *allows* churches to advance religion . . . ." *Id.* at 337.

Although *Amos* warned against falling into the trap of treating an accommodation as *per se* having the purpose or effect of advancing religion, the Sixth Circuit did just that when it found RLUIPA to have an arguably impermissible purpose and a plainly impermissible effect. Pet. App. A5-7. *Amos* explicitly rejected the argument that any statute lifting burdens on religion would automatically have an unconstitutional purpose, even assuming the statute goes beyond constitutional requirements. *Amos* explained that, for an accommodation to be constitutional, it must first "serve a 'secular legislative purpose.' [*Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).] This does not mean that the law's purpose must be unrelated to religion – that would amount to a requirement 'that the government show a callous indifference to religious groups,' *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), and the Establishment Clause has never been so interpreted." *Amos*, 483 U.S. at 335. *Amos* further explained that "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335.

Congress enacted RLUIPA to lift official burdens on the religious activities of inmates and "alleviate significant governmental interference." *Amos*, 483 U.S. at 335 (construing *Lemon*, 403 U.S. 612-13); *see also* RLUIPA § 5(a), (b), (e). It made no pronouncement that religion is more important than all other rights. Rather, it was attempting to address the distinctive problems of religious exercise in prisons and similar institutions. Congress was well aware that prison officials often impose "frivolous or arbitrary

rules" on the religious exercise of prison inmates and other institutionalized persons. 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy).

Amos also rejected the claim that a statute, like RLUIPA, which lifts burdens on religion automatically has the effect of establishing religion. Specifically with regard to effect, *Amos* said, "The second requirement under *Lemon* is that the law in question have 'a principal or primary effect . . . that neither advances nor inhibits religion.'" *Amos*, 483 U.S. at 336 (quoting *Lemon*, 403 U.S. at 612). The legislative record here indicates an effect indistinguishable from those found permissible under *Amos*. RLUIPA lifts burdens that the government routinely imposes on inmates' religious exercise. This was specifically acknowledged by RLUIPA's sponsors, who supported passage of RLUIPA because it had the effect of redressing excessive government interference with religion. They observed that, as a result of official "indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy). Correcting such official actions "'neither advances nor inhibits religion.'" *Amos*, 483 U.S. at 336 (quoting *Lemon*, 403 U.S. at 612).

Amos was not the first decision by this Court to approve religious accommodations lifting government burdens on religion. In *Walz*, 397 U.S. at 673, this Court upheld a property tax exemption granted to church property because ". . . it is simply sparing the exercise of religion from the burden of property taxation. . . . " *Id.* The Court reached the same conclusion in *Zorach*, 343 U.S. at 311, which upheld a program authorizing the release of public school students from class to attend religious

instruction because the released-time program did no more than remove a state-generated obstacle to religious instruction.

2. Treatment Of RLUIPA's Accommodations As Gratuitous Benefits To Religion Would Invalidate Widely-Accepted Accommodations Of Religion

If RLUIPA were to be invalidated because it is a gratuitous benefit to religion, the impact on other widely-accepted accommodations of religion would be immediate and sweeping. Virtually all legislative and administrative religious accommodations singling out religion would be rendered unconstitutional. It would no longer be constitutional for Congress to provide a statutory exemption from military service for religious conscientious objectors without providing an exemption for secular, political objectors. *See* Universal Military Training and Service Act, 50 U.S.C. app. § 456(j); *United States v. Seeger*, 380 U.S. 163 (1965); *Welch v. United States*, 398 U.S. 333 (1970). Likewise, it would no longer be constitutional for Congress to exempt ordained ministers and divinity students from compulsory military service. 50 U.S.C. app. § 456(g). Further, Congress would be prohibited from authorizing the Department of Defense to allow the wearing of religious apparel by military personnel while in uniform because the accommodation is not required by the Free Exercise Clause and no such accommodation is granted to nonreligious apparel. 10 U.S.C. § 774; *but see Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that the Free Exercise Clause does not bar disciplining of uniformed, Jewish Air Force officer for wearing a yarmulke). It would also be impermissible for the Department of Defense to pay military chaplains, while only accommodating members of the press by permitting them to be present in war

zones like Iraq without paying their salaries and living expenses.

The impact on accommodations provided at the state level would be equally significant. State prisons would be required to remove religious chaplains from their payrolls because there are no equivalent nonreligious, full-time personnel employed to address the constitutionally permissible secular ideological and political activities of inmates. Other common but less widely known statutory and regulatory accommodations would also be invalidated. For example, it would be impermissible for the State of Ohio to exempt ordained ministers from the statutory requirement that no one shall render services or engage in the practice of psychology without a license. OHIO REV. CODE ANN. § 4732.22(F). Connecticut could not exempt religious rituals from the state approved methods of animal slaughter. CONN. GEN. STAT. § 22-272a(e). And, Delaware could not exempt persons who treat the ill by means of prayer alone from rules governing provision of medical treatment. DEL. CODE ANN. tit. 16, § 530.

C. The Sixth Circuit's Efforts to Distinguish *Amos* Were Unsuccessful

1. The Sixth Circuit's View That *Amos* Only Allows Legislative Accommodations Where There Are "Arguable Violations" Of The Establishment Clause Is Mistaken

The Sixth Circuit said that *Amos* was distinguishable because "the exemption in *Amos* was arguably necessary to avoid a violation of the Establishment Clause." Pet. App. A5. It reasoned that RLUIPA is different because it ". . . was not even arguably necessary to avoid a violation of the Establishment Clause." *Id.* It read *Amos* as if the

religious exemption to Title VII was only valid because, without the exemption, Title VII would unconstitutionally entangle the government in the affairs of the church. *Id.*

Amos, however, does not stand for that proposition. *Amos* explicitly assumed, for the Establishment Clause analysis, ". . . that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more." *Amos*, 483 U.S. at 336. Thus, it approved an accommodation motivated by a legislative desire to unburden religious exercise, whether or not it was constitutionally protected. It did not rule that the only permissible legislative accommodations were those to prevent an unconstitutional entanglement.

> "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." There is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (citations omitted).

Id. at 334. This Court has not subsequently read *Amos* in the limited fashion suggested by the Court of Appeals. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *Grumet*, 512 U.S. at 705-06; *County of Allegheny*, 492 U.S. at 601, n.51.

2. Statutes That Alleviate Restrictions On Prisoners' Religious Activities Permitted By The Free Exercise Clause Do Not Automatically Violate The Establishment Clause

The Sixth Circuit also sought to distinguish *Amos* on the ground the only government burdens on religious exercise of prisoners that could be accommodated were

those that violated their free exercise rights. Pet. App. A5. In its view, RLUIPA could not be constitutional because it lifted burdens on religion that corrections officials could lawfully impose. *Id.*

The Court of Appeals based its reasoning on the relaxed standard of constitutional review applied to prisoner cases by *Turner v. Safley*, 482 U.S. 78, 87 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50 (1987). Under *Turner*, prison regulations restricting inmate-to-inmate correspondence and the right of inmates to marry were constitutionally permissible because they were reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 87. *O'Lone* applied this standard of justification to official burdens on the free exercise of religious inmates. *O'Lone*, 482 U.S. at 349-50. In the Court of Appeals' view, RLUIPA establishes religion because the religious burdens it lifts are reasonably related to legitimate penological interests and therefore are constitutionally permissible under the *Turner* and *O'Lone* standard. Pet. App. A5.[15]

This reasoning is categorically mistaken. It confuses burdens on religion imposed by prison restrictions that are constitutionally permissible under *Turner* and *O'Lone* with the fact that the state is actively burdening religious practice whenever it enforces those restrictions. It is the burden on religion, not the constitutionality of that burden under the *Turner* and *O'Lone* standard, that is relevant in assessing the constitutionality of an accommodation. The burden exists because prison is a total institution where

[15] Petitioners First Amendment claims in their cases are pending and no court has ruled that Respondents have discharged their duties under *Turner* and *O'Lone*.

all behavior of all inmates is categorically restricted, even if the restriction is constitutionally tolerable under *O'Lone*.

A religious inmate denied a kosher diet suffers a substantial and palpable burden on his religious exercise whether or not the denial is permissible under *Turner* and *O'Lone*. The propriety of such burden-lifting is clear where, as here, the burden is lifted by RLUIPA for the secular purpose of preventing arbitrary official conduct burdening religion. "The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs that they would otherwise incur." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (plurality opinion of Brennan, J.).

3. No Rule of Law Requires Equal Treatment of All Constitutional Rights

The Sixth Circuit also distinguished *Amos* on a novel ground not argued by Respondents. It said that *Amos* did not apply to RLUIPA because RLUIPA "giv[es] greater protection to religious rights than to other constitutionally protected rights." Pet. App. A5. Understandably, the Sixth Circuit cited no cases from this Court in support of its proposition, because there are none to cite.

The guarantees of liberty embodied in the Constitution are minimums below which no state may go. This is true outside of prison as well as inside of it, where all rights exist in attenuated form. These constitutional minimums, however, do not prevent the government from offering greater protections for one right without simultaneously offering enhanced protection for other constitutional rights. For example, legislatures may grant the

press greater protection against *ex parte* search warrants than they provide to private citizens. *Compare Zurcher v. Stanford Daily*, 436 U.S. 547 (1998), *with* Privacy Protection Act, 42 U.S.C. § 2000aa. Similarly, this Court has held that the government can subsidize constitutionally protected preventive family planning services without obligating itself to subsidize constitutionally protected abortion-related services. *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991). Petitioners know of no rule of law that would prohibit a legislature from enhancing the rights of inmates to receive visitors, or to have mail privileges, medical care, or any other right without simultaneously protecting all other rights. There is no guarantee of "equal protection of all constitutional rights," requiring that they be enhanced in tandem or not at all.

To support this theory, the Sixth Circuit turned to two district court opinions for support, one that had been previously overruled by the Seventh Circuit and another that was subsequently reversed by the Fourth Circuit. Pet. App. A4 (citing *Al Ghashiyah (Khan) v. Dep't. of Corr. of the State of Wisconsin*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003), *overruled by Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), *rev'd*, 355 F.3d 310 (4th Cir. 2003) (*cert. pending sub nom. Bass v. Madison*, No. 03-1404 (filed Apr. 6, 2004)). Indeed, the Sixth Circuit all but ignored the Seventh Circuit's ruling in *Charles*, which previously had rejected the Sixth Circuit's approach. Pet. App. A4.

Subsequently, in *Madison v. Riter*, the Fourth Circuit explicitly rejected the Sixth Circuit's "equal protection of all constitutional rights" theory:

> We cannot accept the theory advanced by the district court that Congress impermissibly advances religion when it acts to lift burdens on religious exercise yet fails to consider whether other rights are similarly threatened. There is no requirement that legislative protections for fundamental rights march in lockstep. (citations omitted).

Madison, 355 F.3d at 318. The Fourth Circuit's opinion rested on *Amos*' rejection of the argument that religious accommodations not simultaneously accommodating secular activities thereby violate the Establishment Clause. "'[W]here as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to other secular entities.'" *Id.* (quoting *Amos*, 483 U.S. at 338); *accord Benning v. State of Georgia*, Nos. 04-10979 & 04-11044, 2004 U.S. App. LEXIS 24842, at *24 (11th Cir. Dec. 2, 2004) (quoting *Madison*, 355 F.3d at 319) ("In fact, it is 'reasonable for Congress to seek to reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography.'").

The permissibility of accommodating religious activities without accommodating all other rights is buttressed by this Court's approval in *Smith* of the widespread existence of state anti-drug statutes only exempting religious use of peyote. *Smith*, 494 U.S. at 890 (citing ARIZ. REV. STAT. ANN. §§ 13-3402(B)(1)-(3); COLO. REV. STAT. § 12-22-317(3); N.M. STAT. ANN. § 30-32-6(D)). None of the statutes cited exempt secular political or associational uses protected by the First Amendment. Hence, a Native American can use peyote as part of a religious rite, but a political protestor advocating decriminalization of peyote cannot use peyote as part of his political protest. *Cf. Africa v. Pennsylvania*, 662 F.2d 1025, 1036-37 (3d Cir. 1981).

4. RLUIPA's General Accommodation Of Prisoners' Religious Exercise Does Not Violate The Establishment Clause

That RLUIPA accommodates prisoners' religious exercise generally, rather than by accommodating specific religious activities on a case-by-case basis, does not render it invalid. Indeed, it underscores RLUIPA's compatibility with the Establishment Clause. What makes accommodation permissible, even praiseworthy, is that the government is accommodating deeply held religious beliefs, rather than making it easier for favored religious groups to practice their religion. Petitioners recognize that accommodations may justify treating those who practice their religious beliefs differently from those who do not, but they also recognize that accommodations cannot be based on sect. In *Grumet*, 512 U.S. at 705-07, Justice Souter's plurality opinion explained that sect-based accommodations are never constitutional. *Id.* at 706. Justice O'Connor's concurring opinion agreed that the Establishment Clause generally requires equal treatment of believers and nonbelievers, but it went on to explain that accommodation of religion alone does not violate that principle, because the Constitution permits "'*nondiscriminatory* religious-practice exemption[s]' not sectarian ones." *Id.* at 714-16 (quoting *Smith*, 494 U.S. at 890).

RLUIPA's breadth avoids the problem of sectarian preference. Its protections are available to inmates of any faith whose practices are subjected to "governmental burdens." RLUIPA has, in fact, been invoked by inmates who are part of America's remarkable religious diversity. *See, e.g.*, *Charles*, 348 F.3d at 604 (suit by Muslim inmate asking to use prayer oil); *Madison*, 355 F.3d at 313 (suit by Hebrew Israelite to get kosher meal); *Marria v. Broaddus*, 2003 U.S. Dist. LEXIS 13329, at *66, *73 (S.D.N.Y. July 31, 2003) (flat ban on inmate access to Five Percent

religion's literature substantially burdens religious exercise). While some academic writers condemn the general command of accommodation, apparently preferring faith-specific accommodations forbidden in *Grumet*, *see, e.g.*, Marci A. Hamilton, *The Religious Freedoms Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998), Congress wisely followed this Court's mandate when it enacted RLUIPA's sect-neutral accommodation.

The limited record here suggests the dangers of faith-specific accommodations. The Respondents' briefs in the courts below suggest their strong preference for accommodating mainstream religions. For example, Respondents complained that accommodating religious exercise of inmates like Petitioners was a "patently offensive use of public resources." ODRC Cir. Br. 60. One corrections official complained about the need to verify the authenticity of requests for religious accommodation: "Time spent on such tasks is time that cannot otherwise be spent upon the delivery of religious services to inmates adhering to unquestionably established religions." J.A. 202, ¶12. And, ODRC Chaplain Charles Griffin stated, "I truly regret that the House of Yahweh is not a mainstream religion because that would help us come to a more agreeable resolution of some of your requests," even though a policy of accommodation based on state favoritism of majority faiths is unsustainable. J.A. 279; *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

RLUIPA's even-handed protection of all religions will help neutralize any official temptation to favor popular mainstream religions over less popular religions. It is precisely the breadth of RLUIPA that makes it constitutional.

5. The Sixth Circuit's Hypothetical Comparing RLUIPA's Treatment of Religious And Political Literature Does Not Support Its Holding

In support of its holding that RLUIPA impermissibly favors religion, the Sixth Circuit posited a hypothetical case which, it said, demonstrates that RLUIPA's accommodation of religion impermissibly prefers religious speech over political speech. Pet. App. A7-8. The hypothetical compared the authority of prison officials under RLUIPA to confiscate an inmate's white supremacist religious literature with the authority of prison officials to confiscate an inmate's white supremacist political literature. The Sixth Circuit said that because RLUIPA provides more *procedural* protection to white supremacist religious literature than the First Amendment provides to white supremacist political literature, it violates the Establishment Clause. *Id.*

The Court of Appeals' reasoning is seriously flawed. The Establishment Clause is not violated by a statute that lifts burdens on religious publications without simultaneously lifting burdens on secular publications. A statute that lifts government burdens on religious exercise does not have to "come packaged with benefits" for secular activities. *Amos*, 483 U.S. at 338. Thus the fact that RLUIPA might lift a government burden on access to religious literature without lifting burdens on political activities does not render it unconstitutional. It merely reflects a legislative judgment that government burdens on religious activities are inconsistent with the general welfare.

Moreover, the Circuit's hypothetical is based on the mistaken assumption that, because of RLUIPA, inflammatory white supremacist religious literature will be admitted

to a prison, where inflammatory white supremacist political literature will not. RLUIPA itself provides prison officials with ample authority to exclude inflammatory white supremacist religious publications when they have a compelling interest in doing so. As a consequence, both inflammatory white supremacist religious and political literature are likely to be excluded, even if the burdens of justification are different. There is no reported case under any constitutional or statutory standard, including the Religious Freedom Restoration Act of 1993, RLUIPA, state statutes akin to RLUIPA, or the First Amendment, holding that either religious or secular inmates have a right of access to inflammatory white supremacist literature of any kind.[16] Any actual difference in treatment of inflammatory religious and political literature is more imagined than real.[17]

D. ODRC Respondents' Alternative Establishment Clause Arguments Are Not Persuasive

In their briefs below, ODRC Respondents took a different tack than that taken by the Court of Appeals.

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[16] Petitioners can find no cases admitting inflammatory religious literature into prisons. *See, e.g., Lawson v. Singletary*, 85 F.3d 502 (11th Cir. 1996) (there is a compelling state interest in prison exclusion of religious white supremacist literature under RFRA except where literature could be appropriately redacted); *Reimann v. Murphy*, 897 F. Supp. 398 (E.D. Wis. 1995) (there is a compelling state interest under RFRA justifying exclusion of religious white supremacist literature from prison); *George v. Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995) (same); *Haff v. Cooke*, 932 F. Supp. 1104 (E.D. Wis. 1996) (same); *Metheny v. Anderson*, 953 F. Supp. 854 (N.D. Ohio 1996) (exclusion of religious white supremacist literature from prison permissible under RFRA because there was no substantial burden on religious exercise).

[17] Petitioners do not concede they seek inflammatory literature, and that question is not before this Court.

They argued that RLUIPA is unconstitutional because it imposes burdens on third parties – corrections staff and inmates who do not assert RLUIPA's protections. They also informed this Court that they intend to argue that RLUIPA is unconstitutional because it violates their proposed federalist reading of the Establishment Clause. ODRC Cert. Reply 2. This latter argument was not made below.

1. RLUIPA Does Not Impermissibly Impose Burdens On Third Parties

ODRC Respondents argued below that RLUIPA impermissibly burdens third parties by imposing costs on ODRC staff and inmates that should be held unconstitutional under *Estate of Thornton v. Caldor, Inc.*, 422 U.S. 703 (1985) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). ODRC Cir. Br. 29-31.[18] They argued that RLUIPA purportedly imposes unconstitutional burdens on prison religious staff by compelling them to respond to the religious needs of Petitioner inmates, diverting some of the prison staff's attention and resources from servicing the religious needs of the other inmates. ODRC Respondents also claimed that RLUIPA creates an unconstitutional burden on third parties because it burdens prison security and therefore endangers others. *Id.*

While Petitioners have not yet had the benefit of an adversary proceeding to test the factual bases for these claims, Respondents' argument boils down to a contention that RLUIPA impermissibly imposes burdens on third parties because it marginally increases the costs of prison

[18] ODRC Respondents did submit affidavits describing these burdens; however, neither the affidavits nor the claims they make have received judicial consideration in adversary proceedings.

administration. This is not really an argument that RLUIPA is unconstitutional on its face. It is a claim that the Act does not apply because compliance is so burdensome that there is a compelling governmental interest justifying noncompliance. Since this appeal is from a decision invalidating RLUIPA on its face, the application of RLUIPA to a particular request for religious accommodation in light of specific burdens on Respondents is not before the Court.

The "burdens" Respondents point to are not burdens relevant to the Establishment Clause. Respondents are public employees who have no personal, judicially enforceable interest in performing their tasks in any particular way. They have no enforceable right to execute their duties under pre-RLUIPA standards, any more than a Christian chaplain at the ODRC could object to prison policies requiring the provision of services to Muslims or Buddhists, as well as Christians, because they divert him or her from "attending to the religious needs of a vast majority of inmates . . . ." J.A. 187.

Indeed, the asserted burdens imposed by RLUIPA are indistinguishable from ordinary burdens that are imposed by any law constraining or otherwise affecting government activity. Government officials faced with any new law are always "burdened" by the duty to adjust existing procedures and comply with its new requirements, which may in turn require additional expenditures or reallocations of funds. Petitioner inmates can find no case suggesting that the increased cost of government activities resulting from such compliance with a statutory accommodation of religion is the kind of burden the Establishment Clause forbids.

Burdens on private third parties do not invalidate an accommodation unless they run afoul of the bedrock

principle of the religion clauses – that religious observance must be voluntary. If, by the government accommodating X, a private party, it necessarily requires Y, another private party, to unwillingly participate in a religious exercise or to pay for it, then the government is unconstitutionally compelling Y to engage in a religious exercise. Here, however, no ODRC official is required by RLUIPA to actively participate in any of Petitioner inmates' religious exercises. Moreover, no individual official is required to take money from his or her own pocket and pay for them. At most, RLUIPA obligates Respondents to accommodate religious exercise in the same way that prison (and military) chaplains of all faiths routinely accommodate religious practices of those under their care.

2. *Estate of Thornton v. Caldor* Does Not Support ODRC Respondents' Establishment Clause Claim

Respondents' heavy reliance on *Caldor* is wholly misplaced. *Caldor* invalidated a Connecticut statute that created an *absolute* right for Sabbath observers to not work on their Sabbath no matter how much their absence burdened their employer and co-workers. The Connecticut statute required everything to give way to Sabbath observance. "In effect, Connecticut had given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees." *Amos*, 483 U.S. at 337, n.15.

RLUIPA, by contrast, only lifts substantial burdens on religious exercise if there is no countervailing, narrowly tailored governmental interest. It does not command accommodation without regard to impact on third parties. If a religious practice endangers third parties at a prison by, for example, creating a bona fide health or security

risk, RLUIPA provides that the practice need not be accommodated. There is no statutory requirement of compliance in the face of "undue hardship." *Caldor*, 472 U.S. at 711-12 (O'Connor, J., concurring). Thus, the government may substantially burden inmate religious exercise when it has a compelling governmental interest and selects the least restrictive means to address that interest. And, RLUIPA § 5(e) explicitly reserves to prison officials the choice of means to avoid an undue burden, even if it is not the means preferred by the inmate. 42 U.S.C. § 2000cc-3(e).

RLUIPA's sponsors stated on the Senate floor that courts are to give ". . . due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy). Experience with the Religious Freedom Restoration Act, which had language similar to RLUIPA, indicates that, indeed, there has been extensive judicial deference to the judgment and expertise of prison officials. According to the Fourth Circuit, "[t]he experience of federal correctional officials in complying with RLUIPA's predecessor statute, RFRA, suggests that the similar provisions of RLUIPA would not impose an unreasonable burden on state or local prisons. In the cases litigated under RFRA, federal correctional officials have continued to prevail the overwhelming majority of the time." *Madison*, 355 F.3d at 321 (citation omitted); *cf.* Derek L. Gaubatz, *Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y (forthcoming 2005).

3. *Texas Monthly v. Bullock* Does Not Support ODRC Respondents' Establishment Clause Claim

The ODRC Respondents' reliance on *Texas Monthly* in the courts below is equally flawed. In the context of this case, *Texas Monthly* stands only for the proposition that a subsidy in the form of a sales or use tax exemption for religious periodicals violates the Establishment Clause when it is not equally available for secular periodicals.[19] "[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly *or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion* . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." *Texas Monthly*, 489 U.S. at 15 (quoting *Amos*, 483 U.S. at 348) (emphasis added). It should be noted that this quote is from the *Texas Monthly* plurality opinion and is the narrowest possible reading of *Amos*. However, a majority of the Justices in *Texas Monthly* thought the opinion too narrowly cabined the permissible scope of accommodation. *See id.* at 25 (White, J., concurring); *id.* at 26-29 (Blackmun, O'Connor, JJ., concurring); *id.* at 29-45 (Scalia, Rehnquist, Kennedy, JJ., dissenting).

ODRC Respondents relied on the *Texas Monthly* plurality opinion in the courts below because it holds that

[19] Nondiscriminatory taxes imposed upon First Amendment activities on the same basis as they are imposed upon activities not protected by the First Amendment do not violate the Constitution. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-93 (1983).

a tax exemption given only to religious periodicals unconstitutionally shifts tax burdens to nonreligious periodicals. However, in contrast to a tax exemption, RLUIPA provides no subsidy. Rather, it removes governmental barriers to religious practice.

4. No Federalism Policies Inherent In The Establishment Clause Invalidate RLUIPA

According to their reply to the petition for writ of certiorari, ODRC Respondents will contend that RLUIPA fails under a federalist reading of the Establishment Clause. ODRC Cert. Reply 10-11. This argument was made by Virginia in *Madison*, 355 F.3d at 322, and in its pending petition for writ of certiorari in *Bass v. Madison*, No. 03-1404 (filed Apr. 6, 2004). However, ODRC Respondents did not advance this contention in the courts below. It appears they will claim that RLUIPA violates the Establishment Clause because RLUIPA's accommodation violates the states' supposed authority to determine which religions should enjoy the benefits of accommodation and which should not. *Id.*

The federalist reading is based on the understanding that the Establishment Clause was originally intended to prevent Congress from establishing a national religion, while simultaneously protecting religions established by the states against Congressional action. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330-31 (2004) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 679-80 (2002) (Thomas, J. concurring); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting). Accordingly, it is said to follow that the states should have a wider, broader "margin of appreciation" to aid religion – even on a selective basis – than Supreme Court cases currently permit. Richard C. Schragger, *The Role of the*

Local in the Doctrine and Discourse of Religious Liberty, 117 HARV. L. REV. 1810, 1813-14 (2004). Such a reading of the Establishment Clause would require the overruling of all this Court's Establishment Clause decisions addressing state practices affecting religion. *Grumet*, 512 U.S. at 705-07; *Larsen v. Valente*, 456 U.S. 228, 246 (1982). It would also conflict with Congress' long-standing practice of implementing the Establishment Clause by conditioning federal grants on the agreement of recipients not to use them for religious purposes.[20]

No federalist reading of the Establishment Clause has ever been adopted by a majority of this Court. Moreover, a reading of the Establishment Clause that invalidates RLUIPA is wholly incompatible with the well-settled principle that the Establishment Clause of the First Amendment as incorporated under the Fourteenth Amendment applies to the states. *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 8 (1947) (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)). It forgets "... how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States." *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985).

Even if it were to be held, as suggested by AKHIL REED AMAR, THE BILL OF RIGHTS' CREATION AND RECONSTRUCTION 254 (1998), that the Establishment Clause was originally a federalist provision, the Clause, as incorporated, must certainly include the basic principle of no

[20] Such conditions are common in aid to parochial schools. *See* 20 U.S.C. § 7301 to 7373; *Mitchell v. Helms*, 530 U.S. 793, 801-02 (2000); *Agostini v. Felton*, 521 U.S. 203, 209-10 (1997).

denominational preference. This is a principle that RLUIPA accomplishes far better than the ad hoc approach to accommodation that Respondents apparently will urge. Indeed, the Fourth Circuit found the federalism challenge to be such an unpersuasive Establishment Clause claim in *Madison* that it remanded the challenge to the district court for treatment as a Spending Clause argument. *Madison*, 355 F.3d at 322.

II. THIS COURT SHOULD NOT DECIDE ISSUES NOT DECIDED BY THE COURT BELOW

Because the Sixth Circuit found that RLUIPA, on its face, violated the Establishment Clause, it did not discuss or decide ODRC Respondents' Spending Clause or Commerce Clause claims. The District Court and the Magistrate Judge held that the Act did not violate the Establishment Clause and was well within Congress' spending power. Neither court below addressed the Commerce Clause challenge, and the District Court stated that a ruling on the issue would be an improper advisory opinion. Pet. App. B4. The record contains *no* factual or legal findings relevant to the Commerce Clause and only skeletal legislative facts with respect to RLUIPA's facial validity under the Spending Clause. *Id.*

Although it has power to decide questions neither addressed nor resolved by the Co rts of Appeals, *United States v. Locke*, 471 U.S. 84, 92-93 (1985), this Court generally refrains from exercising that power, even when the questions have been properly raised and preserved, and even when a judgment would otherwise be reversed. *See, e.g., Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2372 (2004); *Glover v. United States*, 531 U.S. 198, 205 (2001). Thus, virtually without exception, this Court declines to decide "... issue[s] on which the trial

and appellate courts did not focus, . . . [and when] the trial court offered little in the way of concrete detail for its conclusions . . . ." *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998).

The sole question presented by the petition for writ of certiorari was "[w]hether Congress violated the Establishment Clause by enacting [RLUIPA] . . . ." To consider Respondents' Spending and Commerce Clause arguments would undermine the settled process by which "[t]he Court decides which questions to consider through well-established procedures . . . ." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). Should this Court reverse the judgment below, Respondents remain free to raise whatever other arguments they have on remand.

In all events, Respondents' arguments fail on their merits. As explained below, RLUIPA is well within Congress' delegated powers under both the Spending and Commerce Clauses.

III. RLUIPA IS A LEGITIMATE EXERCISE OF CONGRESS' SPENDING POWER

A. Respondents' Challenge To Congress' Spending Authority To Enact RLUIPA Misapplies Applicable Constitutional Standards

The ODRC Respondents argued below that the condition RLUIPA imposes on receipt of federal corrections funds violates Congress' broad constitutional authority under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, because the Act is not congruent and proportional to the purposes for which the funds are granted. ODRC Cir. Br. 35-45. This argument fails for two reasons. First, it imports the restrictive standards articulated by this Court in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), which is not a Spending Clause case. Second, it is premised on a misreading of *South Dakota v. Dole*, 483 U.S. 203, 207-08

(1987), which defines the limits of Congress' power to impose conditions on states' receipt of federal funds. As Respondents concede, there are conditions under which RLUIPA can be constitutionally imposed. ODRC Cir. Br. 38-39. As a consequence, Respondents cannot demonstrate that RLUIPA is facially invalid because there are circumstances in which it can be constitutionally applied. *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004).

Congress' broad spending authority is substantive and allows for programs of cooperative federalism in which state participation is voluntary; however, Congress' legislative power under the Fourteenth Amendment is remedial and, therefore, more limited. Nothing in this Court's cases, or in the history of Congressional practice, suggests that *Boerne*'s "congruence and proportionality" requirement, applicable to Fourteenth Amendment remedial legislation, is appropriately applied to Congress' authority to spend for the general welfare. Moreover, *Sabri*, 124 S. Ct. at 1946, which recently upheld a Spending Clause condition, applied a necessary and proper analysis rather than *Boerne*'s "congruence and proportionality" requirement. *Accord Benning*, 2004 U.S. App. LEXIS 24842 at *9-*14; *Mayweathers v. Newland*, 314 F.3d 1062, 1066-68 (9th Cir. 2002); *Charles*, 348 F.3d at 606-10.

Should Respondents' "congruent and proportional" approach be applied to RLUIPA, other long-established statutory conditions would be invalidated. For example, it would require invalidation of the Equal Access Act, requiring schools that receive federal funds to grant religious student clubs the same access to school facilities as secular student clubs. *Bd. of Educ. of the Westside Cmty Schs. v. Mergens*, 496 U.S. 226, 235-36 (1990). It would also invalidate the condition in the Education of the Handicapped Act, mandating federally subsidized schools to provide individualized medical service to handicapped students

attending those schools. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 886-87 (1984); *Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66, 68-69 (1999).

B. RLUIPA Is Well Within The Limits of *South Dakota v. Dole*

RLUIPA is well within the broad spending authority accorded to Congress by *South Dakota v. Dole*, *supra*, 483 U.S. at 206-7. In *Dole*, this Court explicitly held that Congress has the authority to choose how it will spend federal funds for the general welfare, U.S. CONST. art. I, § 8, cl. 1, and "may attach conditions on the receipt of federal funds, and . . . [employ] the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *Dole*, 483 U.S. at 206-07 (citations omitted). In addition, Congress may use its spending authority to impose conditions which implement objectives that cannot be accomplished through direct legislation. *Dole*, 483 U.S. at 207.

Dole's respectful treatment of Congress' spending power was reaffirmed in *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 214 (2003), where this Court upheld the Children's Internet Protection Act, which conditions public libraries' receipt of federal funds subsidizing Internet access on the use of Internet filters. Citing his opinion in *Dole*, Chief Justice Rehnquist wrote, "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *Am. Library Ass'n, Inc.*, 539 U.S. at 203 (citing *Dole*, 483 U.S. at 206). While he acknowledged that Congress' discretion to impose conditions on use of its funds is not unlimited, he reiterated the Court's reluctance to impose limits on Congress' policy choices. *Id.* at 203, 211.

When Congress drafted RLUIPA, it took into account the four requirements spelled out in *Dole*, 483 U.S. at 207-208, and carefully drafted RLUIPA to comply with them. Congress knew that conditions on grants and subsidies (1) must be in pursuit of the general welfare; (2) must be unambiguous so that recipients are on notice of their existence; (3) "might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" (citations omitted); and, (4) the conditions cannot be barred by other constitutional provisions. RLUIPA complies with each of *Dole*'s requirements.

1. RLUIPA Is In Pursuit Of The General Welfare

The courts must defer to Congress unless there is ". . . a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress." *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (quoting *United States v. Butler*, 297 U.S. 1, 67 (1936)). Only a "display of arbitrary power, not an exercise of judgment" exceeds Congress' discretion to choose the subjects and goals of its spending power. *Id.* at 640.

RLUIPA advances the general welfare because it is a condition on the receipt of federal funds that has the "permissible legislative purpose to alleviate significant governmental interference" with religious practice. *Amos*, 483 U.S. at 335. It serves the general welfare by preventing government interference with religious exercise, an area of human activity given distinctive protection under the First Amendment. *See Norwood v. Harrison*, 413 U.S. 455 (1971); *see also* 146 CONG. REC. H1790 (daily ed. July 27, 2000) (statement of Rep. Canady). "[B]y fostering nondiscrimination, RLUIPA follows a long tradition of federal

legislation designed to guard against unfair bias and infringement on fundamental freedoms." *Mayweathers*, 314 F.3d at 1067; *see also Lau v. Nichols*, 414 U.S. 563 (1974) (Congress has the authority to impose conditions on federal funds to protect individual liberties).

RLUIPA also serves the general welfare by increasing options for rehabilitation of some inmates who voluntarily seek to engage in religious exercise, but are unable to do so because of needless prison restrictions. According to Senator Kennedy, one of RLUIPA's sponsors, permitting "[s]incere faith and worship can be an indispensable part of rehabilitation . . . ." 146 CONG. REC. S6689 (daily ed. July 13, 2000). Current corrections grants reflect Congress' view, and its judgment that permitting voluntary religious exercise can sometimes enhance prospects for rehabilitation is supported by social science studies and expert opinion. *See* Byron R. Johnson & David B. Larson, *Linking Religion to the Mental and Physical Health of Inmates: A Literature and Research Note*, 1997 AM. JAILS 29.

Though Ohio may disagree with Congress' judgment, the judgment is a reasonable one, well within Congress' policy-making authority.

2. RLUIPA's Conditions Are Unambiguous

RLUIPA § 3 (a)(1) and (2) unambiguously notify corrections officials receiving federal funding that they must cease imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless it furthers "a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(1), (2). In addition, RLUIPA § 4(a) provides

notice of a private right of action triggered by violation of § 3 of the Act. 42 U.S.C. § 2000cc-2(a).

RLUIPA's legal standards are familiar and have been long used. The "compelling governmental interest" has long been used by this Court. *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 384-85 (1990). Similarly, the "least restrictive means" test is a well-established and frequently applied rubric. *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539 (1993). Indeed, Ohio uses the least restrictive means test in interpreting the Ohio Constitution religion clause. *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000).

In the District Court, Respondents argued that RLUIPA's least restrictive means test is too vague "because it does not tell States what is expected of them." ODRC Motion to Dismiss Mem. 27. The objection, which apparently was abandoned in the Court of Appeals, contends, in effect, that RLUIPA should specify every application to which it applies. However, neither *Dole* nor *Pennhurst State Sch. v. Halderman*, 451 U.S. 1 (1981), the cases from which the notice requirement is derived, impose such a requirement. For the Court to find that RLUIPA provides insufficient notice to Respondents would require every situation covered to be "specifically identified and proscribed in advance." *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985). This impossible requirement would demand such detail that federal grants would read like a catalogue of all possible situations.

3. The Conditions Imposed By RLUIPA Are Clearly Related To The Federal Interest In Particular Projects And Programs.

RLUIPA's funding condition is clearly related to the federal interest served by the grant of funds to state prisons. By requiring that a condition be related, *Dole* means only that there should be a rational connection between the funds expended and the condition imposed. The connection in *Dole* was between the federal goal of funding highway construction and the condition of raising the drinking age in order to make highways safer. Here, the connection is far more direct. The government is funding incarceration of inmates, but only under suitable conditions. It is the same as congressional funding of state prisons under the condition that inmates are provided with health care and diet that meet federal standards. RLUIPA addresses Congress' interest in not subsidizing activities that are unacceptable or are inconsistent with its policy choices. This is not a case where the Spending Clause is being used to accomplish a goal unrelated to the purposes of the grant, like if Congress conditioned Medicare funding on a state's agreement to provide physical education programs in its public schools.

In the Court of Appeals, ODRC Respondents asserted that RLUIPA's conditions "can only be constitutionally applied if there is a direct connection between federal funding and religious burdens." ODRC Cir. Br. 38. *Dole*, however, does not require a "direct connection" or a "particular nexus" between the funding and the condition, only that the condition remove an "impediment to a purpose for which the funds are expended." *Dole*, 483 U.S. at 209. *See, e.g.*, *id.* at 211-12 (upholding federal highway funding condition that required enactment of state laws prohibiting the purchase or possession of alcohol by persons under the age of 21); *Sabri v. United States*, 124 S. Ct. at 1946-47

(upholding federal anti-bribery statute even though the statute applies to bribes unrelated to federal funds); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143-46 (1947) (upholding the constitutionality of a condition prohibiting active participation in political campaigns by any state official employed in federally funded programs).

RLIUPA also satisfies the alternative standard articulated by Justice O'Connor's dissent in *Dole*. Justice O'Connor said that "Congress may only condition grants in ways that can fairly be said to be related to the expenditure of federal funds." *Dole*, 483 U.S. at 217 (O'Connor, J., dissenting). According to her opinion, the measure of the proper relationship turns on whether the condition to be served indicates how the federal funds should be spent. *Id.* at 216.

No matter which test is applied, RLUIPA is valid because it conditions the receipt of federal corrections funds on the recipients' adherence to Congress' standards regarding the proper treatment and rehabilitation of inmates. The District Court recognized that the ODRC receives identifiable federal funds that share RLUIPA's goal of enhancing prospects for rehabilitation. Pet. App. B13. These funds include the ODRC's $28 million grant from the "Violent Offender and Truth in Sentencing Program," which "seek[s] to instill in offenders an improved sense of responsibility and the ability to become productive citizens," J.A. 294, and the $1.3 million Intensive Confinement Construction grant which places an emphasis on the transition of inmates back into the community, J.A. 244.

Certainly, Congress can require, as a condition of funding correctional systems, that funding recipients operate those systems in compliance with minimum

standards of decency in health care and security for inmates and guards. Likewise, it can insist under RLUIPA that funding recipients operate correctional facilities without imposing needless burdens on religious exercise. Congress may make such conditions system-wide, just as it requires that any federally funded institution, program, or activity not engage in prohibited discrimination based on handicap, race, or sex under Title VI, 42 U.S.C. § 2000d-4(a). In *Grove City College v. Bell*, 465 U.S. 555, 573-74 (1984), this Court held that a statutory anti-discrimination condition on federal fund recipients did not apply generally to a college whose students received federal financial assistance and assigned it to the college. It held the statutory language required the statutory condition to apply only to the portion of the college that actually received the funds. *Id.* As a result, Congress amended the statutory condition, making clear that the right to receive federal money is sacrificed even if the discrimination is not directly connected to the federal funding. 20 U.S.C. § 1687. Accordingly, if RLUIPA is unconstitutional, so is the amendment to Title VI.

4. No Provisions Of The Constitution Create An Independent Bar

In order for RLUIPA to fail to meet *Dole*'s fourth prong, it would have to require ODRC Respondents to themselves engage in conduct forbidden by the Constitution. *Am. Library Ass'n Inc.*, 539 U.S. at 203, n.2. The only way for Respondents' compliance with RLUIPA to cause a constitutional violation would be for the accommodation of religious exercise pursuant to RLUIPA to violate the Establishment Clause. Petitioners have already explained why RLUIPA does not violate the Establishment Clause. *See supra* Part I.

Furthermore, it cannot be argued that RLUIPA is barred by the Establishment Clause because it creates a financial incentive compelling state and local officials to lift burdens on religious exercise. If Ohio does not wish to be bound by RLUIPA's incentive, she may "adopt the 'simple expedient' of not yielding to what she urges is federal coercion" by not applying for and accepting the applicable federal grants to state prison programs. *Dole*, 483 U.S. at 210 (quoting *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. at 143-44). No coercion was found in an Establishment Clause challenge to the Spending Clause program in *Mergens*, 496 U.S. at 241, even though the Court conceded that the cost to schools of foregoing the federal funding was so great as to be possibly unbearable. *Id.*

In reality, Respondents are not coerced in any way since they are genuinely free to choose whether to comply with RLUIPA or to forego federal funding. This is not an illusory choice. As Respondents conceded below, the federal grants received by the ODRC during FY 2001 "comprise[d] less than one percent of the recipient's total budget." ODRC Cir. Br. 42. Those same funds comprised approximately .063% of the entire state budget for that year.[21] For FY 2004, federal grants comprised a similarly small percentage of the estimated state budget.[22] Thus, RLUIPA hardly can be said to create a financial inducement passing "the point at which pressure turns into compulsion."[23]

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[21] *See supra* notes 7, 9, and accompanying text.

[22] *See supra* notes 10-13 and accompanying text.

[23] *See Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (loss of 12% of annual state education budget would not be coercive); *Nevada v. Skinner*, 884 F.2d 445, 447-49 (9th Cir. 1989) (condition causing loss of 95% of state highway budget is not coercive);

(Continued on following page)

In brief, should this Court reach ODRC Respondents' Spending Clause challenge to RLUIPA on its face, the challenge should be rejected because RLUIPA complies with all of *Dole*'s standards. In addition, Respondents cannot "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Respondents accept federal subsidies for meals given to young offenders to which they concede "RLUIPA's conditions could quite properly be applied." ODRC Cir. Br. 38. Thus, Respondents' Spending Clause challenge must fail.

IV. ODRC RESPONDENTS' COMMERCE CLAUSE CHALLENGE IS PREMATURE AND UNFOUNDED

A. Respondents' Commerce Clause Challenge Is Premature

The ODRC Respondents' response to the petition for writ of certiorari served notice that they would invite affirmance on the alternative ground that RLUIPA exceeded Congress' commerce power. ODRC Cert. Reply 16, 18-20. However, as already pointed out, this issue was not addressed by the District Court or the Court of Appeals, and it is this Court's regular practice to forgo resolving issues that were not decided below. *See supra* Part II.

Moreover, consideration of Respondents' Commerce Clause challenge is premature because there has never been a determination as to whether the Petitioners' claims satisfy RLUIPA's jurisdictional element. Congress included § 3(b)(2), RLUIPA's jurisdictional element, to limit the

Kansas v. United States, 214 F.3d 1196, 1201-02 (10th Cir. 2000) (condition which causes loss of 66% of funds for one state program and 80% of funds for a second program is not coercive).

Act's application to circumstances where "the substantial burden [on religious exercise] affects, or removal of that substantial burden would affect" interstate commerce. 42 U.S.C. § 2000cc-1(b)(2). This assures that RLUIPA will not be applied indiscriminately in situations unrelated to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

As a consequence, before Respondents' Commerce Clause challenge to RLUIPA was pressed, there should have been a District Court determination as to whether the prerequisite effect on interstate commerce had been shown. That is not to say, however, that Respondents concede such an effect exists. Indeed, their reply to the petition for writ of certiorari argues that "the religious burdens did not have a sufficient impact on interstate commerce to justify application of the Act." ODRC Cert. Reply 5. Yet, rather than permitting the District Court to consider whether the burdens at issue here actually affect interstate commerce, Respondents have single-mindedly pursued their facial challenge as though RLUIPA had no jurisdictional element.

For this Court to address Respondents' Commerce Clause challenge to RLUIPA's validity under these circumstances would violate the teaching of *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). According to *Ashwander*, "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Id.* (citations omitted). ODRC Respondents' Commerce Clause challenge ignores this *Ashwander* principle. If there had been case-specific determinations that the burdens on Petitioners' religious exercise did not affect or interfere with interstate commerce, RLUIPA's Commerce Clause provision would not apply to Respondents' conduct. Petitioners' Commerce Clause allegations would therefore have been dismissed,

negating any need to address Respondents' Commerce Clause challenge.

B. Respondents' Commerce Clause Challenge Is Unfounded Because RLUIPA Is Confined To Burdens That Are Within Congress' Authority

In any event, this Court should reject Respondents' Commerce Clause challenge as unfounded. Congress carefully confined RLUIPA to government burdens that directly interfere with or substantially affect interstate commerce. This unquestionably places RLUIPA within Congress' commerce authority. *Lopez*, 514 U.S. at 558-60. And, as explained above, the Act contains a jurisdictional element that denies jurisdiction over claims when no substantial effect on commerce is involved. *Id.* at 559-61; *United States v. Morrison*, 529 U.S. 598, 613 (2000).

In the courts below, Respondents argued that RLUIPA is unconstitutional, notwithstanding the presence of its jurisdictional element, because the Act covers noncommercial activities. ODRC Cir. Br. 45-47. However, whether RLUIPA addresses noncommercial activities has nothing to do with Congress' constitutional power to regulate those activities. Congress has routinely exercised authority under the Commerce Clause to regulate any activities that actually interfere with or affect interstate commerce. *See, e.g.*, Church Arson Prevention Act, 18 U.S.C. § 247(b) (creating a federal crime when religious property is damaged or destroyed and the criminal undertaking is in or affects interstate commerce); Hobbs Act, 18 U.S.C. § 1951 (making robbery, extortion, or physical violence interfering or affecting interstate commerce a federal crime).

It is well settled that Congress has the authority to regulate activities that directly interfere with the movement

of goods in interstate commerce or substantially affect commerce. *Lopez*, 514 U.S. at 558-60; *see also Stirone v. United States*, 361 U.S. 212, 215 (1960). Petitioners have specifically alleged that ODRC officials have interfered with interstate transactions by preventing them from purchasing or receiving religious items from out-of-state sources. J.A. 50-57, 118, 265. Because Respondents are Petitioner inmates' custodians, it is clear that Petitioners cannot engage in such transactions without ODRC Respondents' permission. Indeed, even beyond this direct interference with commerce, the ODRC has extensive involvement in interstate transactions where the inmates themselves, as well as the goods and services they produce or consume in prison, move in interstate commerce or substantially affect interstate commerce. J.A. 318. This, too, subjects Respondents to Congress' commerce authority.

CONCLUSION

For the reasons explained above, RLUIPA is constitutional on its face and the decision of the Court of Appeals to the contrary in this consolidated appeal should be reversed. In addition, this appeal should be remanded for further proceedings.

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APPENDIX A

42 U.S.C. §§ 2000cc-1 to 5

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which –

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

(Pub.L. 106-274, § 3, Sept. 22, 2000, 114 Stat. 804.)

§ 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

(Pub.L. 106-274, § 4, Sept. 22, 2000, 114 Stat. 804.)

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§ 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall –

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing

exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

(Pub.L. 106-274, § 5, Sept. 22, 2000, 114 Stat. 805.)

§ 2000cc-4. Establishment Clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions. (Pub.L. 106-274, § 6, Sept. 22, 2000, 114 Stat. 806.)

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§ 2000cc-5. Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause" means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government" –

(A) means –

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

(Pub.L. 106-274, § 8, Sept. 22, 2000, 114 Stat. 806.)

APPENDIX B

PL 106-274 (S 2869) §§ 3 to 6, 8

September 22, 2000
RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE. – No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –]

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION. – This section applies in any case in which –

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION. – A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION. – If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT. – Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

* * *

(e) PRISONERS. – Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT. – The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or

any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION. – If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED. – Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED. – Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED. – Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own

operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED. – Nothing in this Act shall –

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE. – A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW. – With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION. – This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL. – Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY. – If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT. – The term "claimant" means a person raising a claim or defense under this Act.

(2) DEMONSTRATES. – The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE. – The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT. – The term "government" –

(A) means –

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION. – The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY. – The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE. –

(A) IN GENERAL. – The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE. – The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

DEC 20 2004
OFFICE OF THE CLERK

No. 03-9877

In the Supreme Court of the United States

JON B. CUTTER, ET AL., PETITIONERS

v.

REGINALD WILKINSON, DIRECTOR,
OHIO DEPARTMENT OF REHABILITATION AND
CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the institutionalized persons provision of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, is consistent with the Establishment Clause of the First Amendment.

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In the Supreme Court of the United States

No. 03-9877

JON B. CUTTER, ET AL., PETITIONERS

v.

REGINALD WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 349 F.3d 257. The opinion and order of the district court (Pet. App. B), adopting the report and recommendation of the Magistrate Judge, is reported at 221 F. Supp. 2d 827.

JURISDICTION

The court of appeals entered its judgment on November 7, 2003. The court of appeals denied the petitions for rehearing on March 3, 2004. The petition for a writ of certiorari was filed on April 19, 2004, and was granted on October 12, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in an appendix to this brief.

STATEMENT

1. a. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. 2000cc *et seq.*, is a civil rights law designed to provide, as a matter of statutory right, protection against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion in two specific contexts. Section 2 of RLUIPA applies to religious exercise in the context of land use regulation. 42 U.S.C. 2000cc. Section 3 of RLUIPA, the provision at issue in this case, protects the free exercise of religion by institutionalized persons. See 42 U.S.C. 2000cc-1. That Section provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a)(1) and (2). "[R]eligious exercise," in turn, is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). RLUIPA defines a covered "government" as "a State, county, municipality, or other governmental entity created under the authority of a State," and "any branch, department, agency, instrumentality, or official of [such] an entity." 42 U.S.C. 2000cc-5(4)(A)(i) and (ii). RLUIPA can be enforced through an action for injunctive or declaratory relief by the Attorney General, 42 U.S.C. 2000cc-2(f), and through a private right of action by any person whose exercise of religion has been substantially burdened. 42 U.S.C. 2000cc-2(a).[1]

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[1] That same statutory standard applies to all activities of the federal government, including operation of the federal prison system, pursuant to the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), this Court struck down that Act's application to state and local governments as exceeding Congress's legislative authority under Section 5 of the Fourteenth Amendment, *id.* at 529-536, but the Act continues to govern the operations of the federal government and its territories and possessions. See RLUIPA, § 7, 114 Stat. 806; *O'Bryan* v. *Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003); *Guam* v. *Guerrero*, 290 F.3d 1210, 1220-1221 (9th Cir. 2002); *Kikumura* v. *Hurley*, 242 F.3d 950, 958-960 (10th Cir. 2001); *In re Young*, 141 F.3d 854, 858-862 (8th Cir.), cert. denied, 525 U.S. 811 (1998).

b. Congress enacted RLUIPA's institutionalized persons provision in response to substantial evidence collected during three years of hearings that, in the absence of federal legislation, persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities face substantial, unwarranted, and discriminatory burdens on their religious exercise. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (*Joint Stmn.*). Congress learned, for example, that prison officials had deliberately taped confessional communications between a priest and penitent and had denied Jewish inmates access to matzo during Passover. H.R. Rep. No. 219, *supra*, at 9-10. Congress also heard testimony of sectarian discrimination in the accommodations afforded prisoners, such as permitting the lighting of votive candles but not Chanukah candles. See *Protecting Religious Liberty After* Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess., Pt. 3, at 41 (1998) (Isaac Jaroslawicz). Prison officials repeatedly refused to let Jewish prisoners miss meals on fast days or to obtain a "sack lunch" to break their fast at nightfall. *Id.* at 43. Instances of unreasoned interference with religious rituals also were identified, including cases where prison officials, (i) "without the ghost of a reason," prevented Protestant prisoners from possessing crosses, (ii) forced a

Catholic priest "to do battle over bringing a small amount of sacramental wine into prisons," and (iii) forbade a prisoner attending Episcopal services to take communion. *Joint Stmn.*, 146 Cong. Rec. at S7774-S7775, S7777.

Based on such evidence, Congress found that the religious exercise of institutionalized persons was being burdened by "frivolous or arbitrary rules," and that, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Joint Stmn.*, 146 Cong. Rec. at S7775; see also 146 Cong. Rec. E1235 (daily ed. July 14, 2000) (Rep. Canady) (RLUIPA responds to "unnecessary government interference" with religious exercise).

Concerned that federal funding not contribute in any measure to such frivolous, unreasoned, or discriminatory impositions on religious exercise, Congress invoked its Spending Clause authority, U.S. Const. Art. I, § 8, Cl. 18, to require that RLUIPA's heightened statutory protection for religious exercise be applied if a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1). A covered "program or activity" includes "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. 2000cc-5(6); see 42 U.S.C. 2000d-4a.

Congress further found that "burden[s] on religious exercise, or the removal of that burden will affect interstate commerce, particularly where the substantial burden on religion "prevents a specific economic transaction in commerce, such as * * * [the] interstate shipment of religious goods." *Joint Stmn.*, 146 Cong. Rec. at S7775. Congress determined that the "aggregate of all such transactions is obviously substantial," as "confirmed by data presented" to it during hearings on the legislation. *Ibid.* To ensure that interstate commerce not become a medium for the

imposition of unwarranted intrusions on religious liberty, Congress invoked its legislative authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, to mandate RLUIPA's application in those cases where "the substantial burden [on religion] affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-1(b)(2). RLUIPA still will not apply, however, if the defendant demonstrates that the type of burden at issue "would not lead in the aggregate to a substantial effect" on interstate commerce. 42 U.S.C. 2000cc-2(g).

2. Petitioners are inmates incarcerated in Ohio correctional facilities and adherents of Odinism, the Church of Jesus Christ Christian, and the Wiccan faith. Those religious denominations are "not traditionally recognized by the Ohio Department of Rehabilitation and Corrections." Pet. App. B5. The respondent prison officials (respondents) concede that those "are *bona fide* religions and that the [petitioners] do genuinely hold these beliefs." *Ibid.* Petitioners claim that respondents failed to accommodate their religious exercise in a variety of different ways, including retaliating and discriminating against them for exercising their non-traditional faiths, denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith. *Ibid.*; Pet. 4.

Petitioners originally filed suit under the First and Fourteenth Amendments. They later amended their complaints to include claims under RLUIPA. Pet. App. A3. Respondents moved to dismiss the RLUIPA claims on the grounds that the law violates the Establishment Clause, exceeds

Congress's legislative authority under the Spending and Commerce Clauses, and violates the Tenth and Eleventh Amendments. Pet. App. B5, B9-B18. The United States intervened in the district court, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of RLUIPA. Pet. App. A3.

The district court denied the motion to dismiss. Pet. App. B. The court noted that the respondents "have raised a facial challenge to RLUIPA's constitutionality, and have not contended that, under the facts of any of the specific cases pending before the Court, applying RLUIPA would produce unconstitutional results." *Id.* at B4. Next, having found that "Congress regularly provides grants" to the Ohio Department of Rehabilitation and Corrections (Department), Pet. App. B7, the district court held that RLUIPA is a valid exercise of Congress's Spending Clause power, *id.* at B9-B13. The court held that RLUIPA is "related to the general welfare of the United States," and it imposes a clear and "unambiguous" condition on the receipt of federal funds. *Id.* at B10, B12. Moreover, RLUIPA's "mild encouragement" of religious accommodation—federal funds constitute less than 1% of the Department's budget (*id.* at B15)—does not "turn enticement into compulsion." *Id.* at B15-B16 (citation omitted). Finally, the court held that RLUIPA's conditions are reasonably related to the purpose of the funds:

> [T]here are a myriad of direct connections between the funds made available to state prison and the restrictions imposed by RLUIPA. On the most basic level, the exercise of religion by prisoners, and the presumed rehabilitative benefits derived from that exercise, pervade the entire prison environment. Moreover, [petitioners] have identified specific programs within [the Department] which both receive federal funding and deal specifically with inmate rehabilitation.

Id. at B13 (citation omitted).

The district court also ruled that no other constitutional provisions stand as a bar to Congress's exercise of its Spending Clause power to enact RLUIPA. In particular, the court held that RLUIPA is consistent with the Establishment Clause because it applies only when religious exercise has been substantially burdened and when no countervailing prison safety and security considerations justify that burden. Pet. App. B14-B15. The court rejected the argument that RLUIPA compromises prison security, holding that no such "factual finding" could be made "on this record," and that, in fact, it remains "an open question as to the extent of the burdens (if any) RLUIPA will necessarily place on third parties such as other inmates or taxpayers." *Id.* at B15.[2]

3. The court of appeals reversed on the ground that RLUIPA violates the Establishment Clause. Pet. App. A. The court held that "RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights," *id.* at A5, and that "the primary effect of RLUIPA is not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners," *id.* at A7 The court further reasoned that RLUIPA "has the effect of encouraging prisoners to become religious in order to enjoy greater rights." *Ibid.* The court of appeals did not address any of the other constitutional challenges to RLUIPA. *Id.* at A8.

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[2] The district court did not address the respondents' Commerce Clause challenge to RLUIPA because resolution of that question would "requir[e] substantial construction of the statutory language" and would raise "serious" factual and legal "questions about the relationship between the internal operation of state prisons and interstate commerce." Pet. App. B9.

SUMMARY OF ARGUMENT

I. After years of hearings, Congress found that the free exercise of religion by institutionalized persons, including inmates, was imperiled by discriminatory accommodation practices and the unjustified and unreasoned imposition of substantial burdens on religion. Invoking its Spending and Commerce Clause authority, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to ensure the evenhanded accommodation of religion in institutions and to require careful and individualized consideration of significant burdens on religious exercise. That legislation fully comports with, and indeed advances, Establishment Clause values. This Court has repeatedly held that alleviating significant, government-imposed burdens on religious exercise does not violate the Establishment Clause and need not come packaged with equivalent benefits for secular entities. To hold otherwise would condemn numerous state constitutions and laws that provide special protection to religious exercise above and beyond what the federal Free Exercise Clause mandates. RLUIPA's comprehensive protection of all religious adherents avoids any potential for sectarian discrimination in the piecemeal accommodation of religion.

The court of appeals' holding that RLUIPA violates the Establishment Clause because it affords religion a preferential status overlooks that the First Amendment itself accords religion special protection, and it leaves room for play in the joints between what the Free Exercise Clause requires and what the Establishment Clause proscribes. The court's holding also ignores what this Court has long recognized— namely, that in tightly regulated governmental settings like prisons and the military, government may accommodate the religious needs of individuals without affording the same consideration to secular interests. RLUIPA thus does not afford religious beliefs any new

status. It simply ensures that the already widely available protections for religion are evenly extended where appropriate and that religious accommodations are made equally available to all sincerely held faiths and are administered on equal terms. Finally, the argument that the Establishment Clause regulates the federal government more forcefully than the States has been repeatedly rejected by this Court.

II. RLUIPA is a proper exercise of Congress's legislative authority. Congress's spending power authorizes it to attach conditions to the receipt of federal funds, including requirements that programs operate under standards of heightened sensitivity to federal concerns, such as eliminating discrimination on the basis of race, sex, age, disability, or religion, and eliminating unjustified burdens on religious exercise. If Ohio finds RLUIPA's standards to be too exacting, the proper recourse is to turn down the federal funds rather than to claim a right to receive them on Ohio's terms.

Although not necessary to a decision in this case, RLUIPA is also a proper exercise of Congress's Commerce Clause power. RLUIPA applies under that authority only when the particular claim at issue, in fact, portends a substantial effect on interstate commerce. RLUIPA thus ensures, on a case-by-case basis, that its application rests upon a cognizable federal interest in preventing the use of interstate commerce to facilitate unjustified or discriminatory burdens on religious exercise.

ARGUMENT

I. THE INSTITUTIONALIZED PERSONS PROVISION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment

Clause." *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987). Moreover, just last Term, the Court reaffirmed that "there is room for play in the joints between" the Free Exercise and Establishment Clauses, such that government can accommodate religion beyond what the Free Exercise Clause mandates, without violating the Establishment Clause. *Locke* v. *Davey*, 124 S. Ct. 1307, 1311 (2004) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)). The institutionalized persons provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, fully comports with the Establishment Clause because it alleviates, in a neutral and balanced manner, substantial and unwarranted government-imposed burdens on religious exercise and because it promotes religious equality.

A. RLUIPA Serves The Valid Secular Purpose Of Alleviating Significant Governmental Interference With Religious Exercise

1. *Accommodations respect, rather than endorse, religion*

"[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious [adherents] to define and carry out their religious missions." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 335 (1987). That is exactly what RLUIPA does. RLUIPA's purpose need not be "unrelated to religion" to survive Establishment Clause scrutiny, for "that would amount to a requirement that the government show a callous indifference to religious groups, * * * and the Establishment Clause has never been so interpreted." *Ibid.* (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952)).

Instead, legislative accommodations of religious exercise like RLUIPA serve a valid purpose because they "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach*, 343 U.S. at

314. Accommodating and respecting the religious character and needs of private persons does not amount to a governmental endorsement of those views or "signify an official endorsement of religious observance over disbelief." *Lee* v. *Weisman*, 505 U.S. 577, 628 (1992) (Souter, J., concurring). Rather, such accommodations reflect a healthy "respect for * * * the fundamental values of others," *ibid.*, and a sensitivity to the fact that "general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all." *Ibid.*; see also *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring in the judgment) ("[S]ince the framing of the Constitution, this Court has approved legislative accommodations for a variety of religious practices."); *id.* at 715 (O'Connor, J., concurring in part and concurring in the judgment) ("What makes accommodation permissible, even praiseworthy, is * * * that the government is accommodating a deeply held belief."). When the government lifts substantial government burdens on religion, it does not transgress Establishment Clause values, but rather it "follows the best of our traditions." *Zorach*, 343 U.S. at 314.

2. *RLUIPA ensures equality in accommodation practices*

"There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation," which is exactly how RLUIPA operates. *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and concurring in the judgment). In enacting RLUIPA, Congress did not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335. Quite the opposite, RLUIPA advances uniformly the civil rights of all religious adherents, including those "not traditionally recognized by the Ohio Department of Rehabilita-

tion and Corrections." Pet. App. B5. Congress played no favorites, and indeed adopted a comprehensive approach that ensures that all faiths will receive accommodations on equal terms.[3]

The court of appeals' observation (Pet. App. A5) that RLUIPA operates more broadly than the traditional, case-by-case approach to accommodations is true—but that is a constitutional asset. That comprehensive protection ensures that governmental accommodations are equally available to all adherents. By contrast, the process of piecemeal accommodations can generate concern that government officials "may fail to exercise governmental authority in a religiously neutral way" and provides no assurance at the outset "that the next similarly situated group seeking [an accommodation] of its own will receive one." *Kiryas Joel*, 512 U.S. at 703 (citation omitted). RLUIPA thus provides the kind of up-front assurance of neutrality that is generally lacking even in permissible accommodations of religion.

The problem of selective accommodations in the prison context, where the very nature of prison life requires some accommodation to enable most religious exercises, is a real one. See Pet. App. B5 (although the sincerity and bona fides of petitioners' faiths are conceded, those faiths are "not traditionally recognized by the Ohio Department of Rehabilitation and Corrections"); J.A. 280 (Ohio prison official's statement that "I truly regret that the House of Yahweh is not a mainstream religion because that would help us come to a more agreeable resolution of some of your requests."); *Madison* v. *Riter*, 355 F.3d 310, 313 (4th Cir. 2003) (plaintiff denied the same kosher diet offered to other prisoners),

[3] Cf. *Kiryas Joel*, 512 U.S. at 706 (New York law "singles out a particular religious sect for special treatment"); *id.* at 715 (O'Connor, J., concurring in part and concurring in the judgment) (accommodations may "justify treating those who share this [religious] belief differently from those who do not; but they do not justify discriminations based on sect").

petition for cert. pending, No. 03-1404 (filed Apr. 6, 2004); *Charles* v. *Verhagen*, 348 F.3d 601, 605 (7th Cir. 2003) (Muslim inmate denied Islamic prayer oil even "though other kinds of fragrant body oils and lotions were made available to inmates").

The need for evenhanded accommodation of religious exercise is at its apex in the context of institutionalized persons, whom the government has deprived of the resources, freedom, and physical capacity independently to meet their own religious needs. That is why in prisons and state mental hospitals, as in the military, the Establishment Clause has long been understood to permit government to do what it generally cannot do elsewhere: provide chaplains, conduct worship services and religious instruction, undertake sacramental practices, provide spiritual counsel, and distribute religious literature.[4]

The need for a comprehensive and non-discriminatory accommodation mandate is particularly acute in such closed and highly regulated environments because a failure to accommodate in that setting has much more drastic and far-reaching repercussions than in society at large. The denial does more than simply leave the religious adherent alone; the adherent actually may be rendered helpless and physically incapable of exercising his faith. The failure to accommodate minority or non-traditional faiths literally can be the death knell for those belief systems within the restrictive regulatory confines of institutional living. See *Zorach*, 343 U.S. at 314 (government may not "throw its weight against efforts to widen the effective scope of religious influence").

[4] See, *e.g.*, *Kiryas Joel*, 512 U.S. at 705-706; *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 226 n.20 (1963); *id.* at 296-297, 299 (Brennan, J., concurring); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 352 (1987); *Benning* v. *Georgia*, No. 04-10979, 2004 WL 2749172, at *12 (11th Cir. Dec. 2, 2004); *Rudd* v. *Ray*, 248 N.W.2d 125, 128-129 (Iowa 1976).

For example, while students denied "release time" have ample alternative opportunities to receive religious instruction, an inmate denied a parallel accommodation may effectively be denied the opportunity to exercise his faith at all.[5]

3. *The power to accommodate is broader than the Free Exercise Clause's mandate*

The court of appeals attempted to distinguish *Amos* (Pet. App. A5) on the ground that the accommodation in "*Amos* arguably was necessary to avoid a violation of the Establishment Clause." But this Court has repeatedly recognized that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. Indeed, "[t]o equate the two would be to deny a national heritage with roots in the Revolution itself." *Ibid.*; see *Locke*, 124 S. Ct. at 1311 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."). Moreover, there is a particularly wide scope for "play in the joints" in the prison context, where the realities of prison life allow for both accommodations and restrictions of religious exercise that would be unconstitutional outside prison walls.

B. RLUIPA Has The Permissible Effect Of Preventing Religious Discrimination And Unjustified Burdens On Religious Exercise

The court of appeals held (Pet. App. A5) that RLUIPA impermissibly affords "greater protection to religious rights than to other constitutionally protected rights." RLUIPA

[5] See *Joint Stmn.*, 146 Cong. Rec. at S7775 ("Institutional residents' right to practice their faith is at the mercy of those running the institution."); 146 Cong. Rec. E1234, E1235 (July 14, 2000) (Rep. Canady) ("The legislation * * * protect[s] the religious exercise of a class of people particularly vulnerable to government regulation—institutionalized persons.").

certainly does afford heightened protection for religious exercise, but there is nothing constitutionally problematic about that.

1. *Government may accommodate religion alone*

The court of appeals' rationale would condemn countless accommodation laws, including (i) the early-release program in *Zorach*, *supra*, which released students to attend religious classes but not to attend political rallies or to engage in other constitutionally protected activities; (ii) tax exemptions for religious property like those upheld in *Walz*, 397 U.S. at 674 (upholding exemption regardless of whether churches share the social welfare character of other exempt entities); (iii) the religious accommodation mandate in Title VII, 42 U.S.C. 2000e-2(a), which requires some accommodation of employees' religious needs, but not other constitutionally protected interests; (iv) 10 U.S.C. 774, a law that, in response to *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), increases protection for religious, but not secular, objections to military uniform restrictions; (v) the sacramental wine exemption from Prohibition, National Prohibition Act, ch. 85, § 3, 41 Stat. 308; and (vi) every state constitution and law that, like RLUIPA, selectively imposes heightened protection for the exercise of religion over and above the federal constitutional floor set in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990).[6]

[6] See Ala. Const. Amend. 622, § V(b) (1999); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-281 (Alaska), cert. denied, 513 U.S. 979 (1994); Ariz. Rev. Stat. Ann. § 41-1493.01(C) (West 2004); Conn. Gen. Stat. Ann. § 52-571b(b) (West 1999); Fla. Stat. Ann. § 761.03(1) (West 1997); Idaho Code § 73-402(3) (2004); 775 Ill. Comp. Stat. 35/15 (West 1999); *State* v. *Evans*, 796 P.2d 178, 179-180 (Kan. Ct. App. 1990) (applying compelling interest test without discussing *Smith*); *Rupert* v. *City of Portland*, 605 A.2d 63, 65-66 (Me. 1992); *Attorney General* v. *Desilets*, 636 N.E.2d 233, 235-236 (Mass. 1994); *Porth* v. *Roman Catholic Diocese*, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995); *State* v. *Hershberger*, 462 N.W.2d

The Establishment Clause does not condemn those widespread and commonsense accommodations of religion for two reasons. First, the Constitution allows religion to be differentially accommodated because religion is different under our constitutional design and history. As evidenced by the dual protections for religion in the First Amendment, the Constitution itself is not neutral on the subject of religion. Indeed, the Constitution contains an accommodation of its own in Article VI, Clause 3, by allowing support for the Constitution to be evidenced by oath or affirmation. *Kiryas Joel*, 512 U.S. at 714 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 744 (Scalia, J., dissenting) see also U.S. Const. Art. I, § 7, Art. VII (excepting Sundays from the ten-day period for exercise of the presidential veto). Moreover, while the Free Speech Clause gives substantial protection to non-religious speech, the Free Exercise Clause gives unique protection to religious conduct, and religious conduct alone.

That special protection for religion reflects the reality that "religion has been closely identified with our history and government," *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203,

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393, 396-398 (Minn. 1990); *In re Brown*, 478 So. 2d 1033, 1039 & n.5 (Miss. 1985); *St. John's Lutheran Church* v. *State Comp. Ins. Fund*, 830 P.2d 1271, 1276 (Mont. 1992) (applying compelling interest test without discussing *Smith*); *In re Browning*, 476 S.E.2d 465 (N.C. 1996) (same); N.M. Stat. Ann. § 28-22-3 (1978); *Rourke* v. *New York State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), aff'd, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *Humphrey* v. *Lane*, 728 N.E.2d 1039, 1043 (Ohio), cert. denied, 531 U.S. 912 (2000); Okla. Stat. Ann. title 51, § 253(B) (West 2000); 71 Pa. Cons. Stat. Ann 2401 *et seq.*; R.I. Gen. Laws § 42-80.1-3(b) (Lexis 1998); S.C. Code Ann. § 1-32-40 (Law Co-op 1976); Tex. Civ. Prac. & Rem. Code Ann. § 110.003(b) (West 2004); *Hunt* v. *Hunt*, 648 A.2d 843, 853 (Vt. 1994); *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 185-187 (Wash. 1992); *State* v. *Miller*, 549 N.W.2d 235, 241 (Wis. 1996); cf. *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) (state constitutional protection of religion is "substantially stronger" than federal protection), cert. denied, 424 U.S. 954 (1976).

212 (1963), and, as this Court has "asserted pointedly" on five different occasions, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Lynch* v. *Donnelly*, 465 U.S. 668, 675 (1984); *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *Walz*, 397 U.S. at 672; *Schempp*, 374 U.S. at 213; *Zorach*, 343 U.S. at 313. Accordingly, "[n]either government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). The Establishment Clause was enacted to protect individuals' ability to exercise their religion free from governmental direction or imposition, not to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens," *County of Allegheny* v. *ACLU*, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring), or to compel official disregard of or stilted indifference to the vital and uniquely defining role that religion can play in people's lives.

Accordingly, this Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid." *Amos*, 483 U.S. at 338. Substantial burdens on religion may be selectively relieved because their impact on the individual is qualitatively different. In addition to suffering the same secular burden as others, the religious adherent also suffers a separate and distinct encroachment on his conscience, spirit, and moral foundation. It "is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with our happy tradition of avoiding unnecessary clashes with the dictates of conscience." *Gillette* v. *United States*, 401 U.S. 437, 453 (1971). To hold otherwise—to insist that the Constitution requires prison officials to equate an inmate's request for sacramental communion wine with another prisoner's secular request for a beer—would be at war with our constitutional tradition.

Second, a religious accommodation does not result in the government advancing religion; it simply affords individuals the opportunity to exercise and advance their religious faith on their own. A law is not unconstitutional simply because it allows religious adherents "to advance religion, which is their very purpose. For a law to have forbidden 'effects' * * *, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Thus, exemptions from generally applicable prison regulations—whether pursuant to RLUIPA or to independent state policies—do not constitute impermissible governmental facilitation of religion, because the government itself neither adds to nor subsidizes propagation of the religious message. *Ibid.* RLUIPA simply affords a comprehensive mechanism to ensure that institutionalized persons have an opportunity to exercise their self-chosen faiths unburdened by unwarranted governmental limits.

For those two reasons, the Establishment Clause does not generally require that accommodations of religion "come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338; see *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment) ("Accommodations may thus justify treating those who share this belief differently from those who do not."). The military may permit soldiers to wear religious headgear, such as a yarmulke, without equally tolerating baseball caps with political slogans or team insignia. Likewise, the government can exempt established religious groups that provide their own mechanisms for supporting elderly members from the Social Security system, 26 U.S.C. 1402(g)(1), without equally exempting tax protesters. And prisons can, and routinely do, meet the dietary needs of religious adherents without similarly accommodating other prisoners' secular food preferences.

2. RLUIPA balances the interests of the religious adherent and third parties

The government's capacity to accommodate religion is not unlimited. Congress may act only "to alleviate significant *governmental* interference" with religious autonomy and exercise. *Amos*, 483 U.S. at 335 (emphasis added). RLUIPA meets that test. RLUIPA's protections apply only when governmental conduct—not private conduct—imposes a "substantial burden" on religious exercise, 42 U.S.C. 2000cc-1(a). Congress thus limited RLUIPA's application to circumstances where the conflict between private conscience and governmental action is acute and where the impact of the law on religious adherents is distinctly intrusive. See *Lee*, 505 U.S. at 629 (Souter, J., concurring); contrast *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.) (waiver of sales tax for religious publications unconstitutional where the tax posed no distinctive burden on religious exercise); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985) (broad statutory mandate to relieve Sabbatarians of even minor burdens imposed by private employers violates the Establishment Clause).

In addition, RLUIPA avoids any impermissible sectarian discrimination in accommodations. In that regard, RLUIPA's coverage for all bona fide religious faiths parallels the Equal Access Act's broad accommodation of religious clubs, see 20 U.S.C. 4071 *et seq.*, which was upheld in *Board of Educ.* v. *Mergens*, 496 U.S. 226 (1990), and that up-front assurance of neutrality stands in sharp contrast to the sect-specific accommodations struck down in *Caldor*, *supra*, and *Kiryas Joel*, *supra*.

Finally, RLUIPA does not impose an absolute command of accommodation, regardless of the cost to the government or third parties. Compare *Caldor*, 472 U.S. at 709-710. The compelling interest test factors the countervailing interests of the government and any burden on third parties into the

accommodation calculus. With respect to prisons in particular, Congress contemplated that RLUIPA's balancing test would afford "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with considerations of costs and limited resources." *Joint Stmn.*, 146 Cong. Rec. at S7775 (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)).[7]

3. *Evenhanded religious accommodation is particularly important in the prison context*

In the court of appeals' view (Pet. App. A6-A7), the prison context constricts Congress's ability to accommodate religion because all fundamental rights are curtailed in prison. That gets it exactly backwards. Courts have long recognized that government's authoritative and comprehensive control over prisoners affords it greater latitude in meeting the religious needs of inmates. *Kiryas Joel*, 512 U.S. at 706 ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion."); see note 4, *supra*. Indeed, long before RLUIPA or the Religious Freedom Restoration Act, Ohio provided chaplains, permitted assemblies for worship services, allowed the possession of religious materials, and otherwise accommodated inmates' religious exercise.[8] Thus

[7] See also *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2338 (2003) (in applying strict scrutiny, "[c]ontext matters"); *Murphy* v. *Missouri Dep't of Corrs.*, 372 F.3d 979, 987-988 (8th Cir.), cert. denied, 125 S. Ct. 501 (2004).

[8] See, *e.g.*, *Pollock* v. *Marshall*, 845 F.2d 656, 657 (6th Cir.), cert. deneid, 488 U.S. 897 (1988); *Abdullah* v. *Kinnison*, 769 F.2d 345, 347 (6th Cir. 1985); *Gawloski* v. *Dallman*, 803 F. Supp. 103, 113 (S.D. Ohio 1992); *Taylor* v. *Perini*, 413 F. Supp. 189, 238 (N.D. Ohio 1976); Ohio Admin. Code § 5120-9-25 (Anderson 1979). The federal Bureau of Prisons has had a chaplaincy program since 1930.

Ohio's inmates (like inmates around the Nation), as a matter of state law, already enjoy "rights superior to those of non-religious prisoners" (*id.* at A7).

RLUIPA thus must be evaluated in light of the special need for accommodation in the prison context and the corresponding reality that the religious needs of many faiths—or at least those "traditionally recognized" by respondents (*id.* at B5)—have long been accommodated behind prison walls. Whatever advantage such accommodations may afford religious adherents as a class, our constitutional tradition has long tolerated it. See *Lynch*, 465 U.S. at 683 ("[O]ur precedents plainly contemplate that on occasion some advancement of religion will result from governmental action."). And the respondents have offered no evidence, despite decades of experience, that those quite significant religious accommodations have unconstitutionally encouraged prisoners "to become religious" (Pet. App. A7). If those substantive accommodations do not transgress constitutional bounds, then neither does RLUIPA. RLUIPA, after all, does not mandate that any particular accommodation be made; RLUIPA simply provides a legal framework that ensures the evenhanded consideration, on equal terms, of all faith-based requests for accommodation.[9]

[9] While the court of appeals correctly noted (Pet. App. A7) that religious accommodations might have particular appeal in the otherwise spartan and highly regulated lives of prisoners, that consideration does not transform every accommodation into unconstitutional coercion. In the heavily regulated and controlled routines of schoolchildren, few things are more highly valued than the opportunity to be released from school custody early. Yet that did not render the school-release program in *Zorach* an unconstitutional enticement to religious conversion. Likewise, members of the military have little control over countless aspects of their daily lives. But that does not make the accommodation of otherwise strict uniform rules to religious needs, 10 U.S.C. 774, an unconstitutional religious incentive.

The court of appeals nevertheless found RLUIPA invalid because (Pet. App. A6) religious rights are not "at greater risk of deprivation in the prison system than other fundamental rights." That is a highly debatable proposition, and a legally irrelevant one in any event. Certainly, the court of appeals' unsubstantiated surmise is an insufficient basis for impugning the legislative judgments of Congress, as well as a number of States, see note 6, *supra*, that have passed laws designed to protect religious exercise in prisons. Furthermore, the Court has emphasized that religion may be accommodated, consistent with the Establishment Clause, even in the absence of any threatened deprivation of Free Exercise rights. It follows, *a fortiori*, that lawful accommodation does not require a predicate showing of a disproportionate risk of deprivation. When the government relaxes its regulations to allow for unencumbered religious exercise, it promotes constitutional values. It does not engage in some constitutionally suspect conduct that requires heightened justification. And even if the free exercise of religion faces no greater risk of deprivation, Congress and the States could reasonably conclude that, given the unique role that religion plays in the lives of its adherents, the consequences of such deprivations take a relatively higher toll on the emotional well-being, development, personal identity, psychological growth, and rehabilitation of inmates.

In the final analysis, the court of appeals' rationale is just a variation of the long-rejected argument that accommodations of religion must come packaged with equivalent benefits for secular interests. Even were that a proper consideration, the court of appeals' argument overlooks that RLUIPA is only one of a long list of federal laws protecting the constitutional and statutory rights of prison inmates. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 656-657 (2002) (Establishment Clause inquiry must consider all relevant programs, not just the specific program challenged).[10] Set in context, then, RLUIPA is simply one component of an overarching federal legislative program that seeks to promote the "perfect equality of civil rights and the equal protection of the laws" in prisons receiving federal money. *Ex parte Virginia*, 100 U.S. 339, 345-346 (1879). Finally, while the respondents have argued that RLUIPA imposes inordinate burdens on prisons and other inmates, the district court specifically found the record insufficient to sustain that charge either facially or as applied to petitioners' claimed religious accommodations. Pet. App. B15.

The respondents' concern (Br. 12-13) that RLUIPA opens the floodgates to inmate litigation also has not been borne out by experience. The number of civil rights lawsuits filed by inmates in federal court in the years following RLUIPA's enactment has remained essentially static, and the number of lawsuits filed in state courts has declined. See http://www.uscourts.gov/judbus2003/appendices/c2a.pdf; see also 139 Cong. Rec. S14,464 (daily ed. Oct. 27, 1993) (Sen. Coats) (prior to *Smith*, "[p]risoner religious exercise suits

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[10] See, *e.g.*, 42 U.S.C. 1997a(a), 1997c(a)(1) (Attorney General may file suit to address "egregious or flagrant conditions" in state prisons); 42 U.S.C. 3769b(a)(1) and (6) (federal assistance for correctional facilities requires States to develop a "plan for reducing overcrowding and improving conditions of confinement" and to provide "reasonable assurance that the applicant will comply with [federal] standards and recommendations"); 18 U.S.C. 4013(a)(4) (federal funds available for construction, physical renovation, acquisition of equipment, supplies, or materials required to establish acceptable conditions of confinement and detention services in any State or local jurisdiction which agrees to provide guaranteed bed space for Federal detainees"); 42 U.S.C. 2000d (prohibiting discrimination on the basis of "race, color, or national origin"); 20 U.S.C. 1681(a) (barring discrimination on the basis of sex in any "education program or activity receiving Federal financial assistance"); 29 U.S.C. 794(a) (prohibiting discrimination on the basis of disability"); 42 U.S.C. 6102 (prohibiting discrimination on the basis of age in "any program or activity receiving Federal financial assistance"); 42 U.S.C. 12132 (prohibiting discrimination on the basis of disability in state and local prisons).

were less than 1 percent of all prisoner civil rights cases in Ohio when [a] higher standard of review was in force"). Furthermore, in the federal government's experience, statutory claims are almost invariably joined with First Amendment and other claims, so that the case would have to be litigated anyway. See 139 Cong. Rec. S14,363 (Oct. 26, 1993) (daily ed. Sen. Hatch) (an increase in prisoner filings followed the issuance of the *Smith* decision). The unfortunate reality is that "prisoners are going to institute a large number of lawsuits regardless of the standard of review applicable to prison lawsuits * * * [b]ecause prisoners do not have many other things to do." *Ibid.* The more effective way to combat abusive prisoner litigation is not to withhold substantive civil rights protections, but to impose procedural requirements that inhibit meritless filings, which Congress has already done. See Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e; see generally Bureau of Justice Statistics, *Prisoner Petitions Filed in U.S. District Court, 2000, with Trends 1980-2000*, at 4-7 (Feb. 2002) (notable decrease in prisoner filings following enactment of the Prison Litigation Reform Act).

The respondents' operational objections to RLUIPA founder in the face of the practical experience of the federal Bureau of Prisons and other States. For more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA, see 42 U.S.C. 2000bb-1, without compromising prison security, public safety, or the constitutional rights of other prisoners.[11] In

[11] In enacting RLUIPA, Congress was aware of the federal Bureau of Prisons' largely favorable experience applying the Religious Freedom Restoration Act in the prison context. See *Joint Stmn.*, 146 Cong. Rec. at S7776 (letter from the Dep't of Justice) ("[W]e do not believe [RLUIPA] would have an unreasonable impact on prison operations. RFRA has been in effect in the Federal prison system for six years and compliance with that statute has not been an unreasonable burden to the Federal prison system.").

addition, a number of States have afforded heightened scrutiny to prisoners' free exercise claims for years without constitutional incident.[12] Indeed, it is difficult to understand how requiring prison officials to allow a Jewish inmate to eat the same kosher meal already served to other inmates, see *Madison*, *supra*, or to allow a Muslim inmate to possess prayer oil on the same terms that other inmates possess oil and body lotions, see *Charles*, *supra*, would trench upon the interests of any other inmates or otherwise run afoul of constitutional limits. On the other hand, if a particular accommodation requested under RLUIPA would inordinately burden other inmates, then the prison's interest in avoiding an unconstitutional accommodation of religion will

[12] See *Outlaw* v. *Warden*, No. CV000802033, 2001 WL 418561, at *1 (Conn. Super. Ct. Mar. 30, 2001); *Roles* v. *Townsend*, 64 P.3d 338, 339 (Idaho Ct. App.), cert. denied, 540 U.S. 839 (2003); *Diggs* v. *Snyder*, 775 N.E.2d 40, 44, 45 (Ill. App. Ct.), appeal denied, 787 N.E.2d 156 (2002); *Steele* v. *Guilfoyle*, 76 P.3d 99, 101-102 (Okla. Ct. App. 2003); S.C. Code Ann. §§ 1-32-45, 24-27-500; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.006(f)–(g); cf. *Evans*, 796 P.2d at 179-180 (probation). The plain text of a number of other state laws appears to extend heightened scrutiny to prisons, but courts have not yet specifically confirmed the law's application in that context. See Ala. Const. Amend. 622, §§ II(5), IV(3) (1999); Ariz. Rev. Stat. Ann. §§ 41-1493(3)–(4) (West 2004); Fla. Stat. Ann. § 761.02(1) (West 1997); N.M. Stat. Ann. § 28-22-2(B) (1978); R.I. Gen. Laws § 42-80.1-2 (1998). Congress also brought to bear the information it learned during the enactment of the Religious Freedom Restoration Act, where the question of the law's applicability to prisons was the subject of specific and extensive debate. See 139 Cong. Rec. at S14,350-S14,368 (daily ed. Oct. 26, 1993); *id.* at S14,461-S14,471 (daily ed. Oct. 27, 1993); H.R. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993); S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993). There, 13 State Attorneys General recommended that the compelling interest test should be applied to the prison context because that test "strikes a proper balance" between the needs of religious claimants and governmental regulation. 139 Cong. Rec. at S14,351-S14,352.

constitute a compelling interest within the meaning of RLUIPA.

C. The Establishment Clause Applies Equally To The Federal And State Governments

In their brief at the certiorari stage (at 11), the respondents referenced, for the first time in this litigation, the argument that the Establishment Clause imposes unique disabilities on the federal government, such that RLUIPA would be constitutional if enacted by a State but is unconstitutional when enacted by the federal government. That late-breaking argument (perhaps inspired by the recognition that the logic of the opinion below renders constitutionally suspect all of Ohio's own longstanding and commonsense accommodations of religion in prison) is meritless.

1. *Stare decisis forecloses the argument*

It is too late in the day to argue that the federal Constitution contains two different Establishment Clauses with varying levels of potency. "This Court has confirmed and endorsed th[e] elementary proposition of law time and time again" that the Fourteenth Amendment "impose[s] the same substantive limitations on the States' power to legislate that the First Amendment ha[s] always imposed on the Congress' power." *Wallace* v. *Jaffree*, 472 U.S. 38, 49 (1985).[13] Indeed,

[13] See *Schempp*, 374 U.S. at 215 ("[T]his Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made *wholly applicable* to the States by the Fourteenth Amendment.") (emphasis added); *id.* at 216 ("In a series of cases * * * the Court has repeatedly reaffirmed that doctrine, and we do so now.") (citing additional cases); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally * * * pass laws or impose requirements which aid all religions as against non-believers."); *Everson* v. *Board of Educ. of Ewing Township*, 330 U.S. 1, 15 (1947) ("There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause."); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) ("The Fourteenth Amendment has rendered the legislatures of the states *as incompetent as Congress* to enact such laws [respecting an establishment of religion].") (emphasis added); see generally *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969) ("In an increasing number of cases, the Court has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.") (quoting *Malloy* v. *Hogan*, 378 U.S. 1 (1964)).

if the Establishment Clause applied differentially to federal laws that encourage or require States to accommodate religion, one would have expected some reference to that fact in the prior opinions of the Court rejecting Establishment Clause challenges to such federal legislation.[14] But not one of those cases suggested that the federal law was peculiarly vulnerable to invalidation, even though each law operated in the precise area that respondents claim is the exclusive domain of the States: the provision of benefits to religious groups or individuals within the "play in the joints" between what the Free Exercise Clause requires and the Establishment Clause forbids. *Locke*, 124 S. Ct. at 1311.

Moreover, in *Wallace*, this Court rebuffed an argument similar to the respondents'. In that case, the district court ruled that the Establishment Clause does not apply to the States based on an analysis of constitutional history similar to respondents'. *Jaffree* v. *Board of Sch. Comm'rs*, 554 F. Supp. 1104, 1113-1126, 1128 (S.D. Ala.), rev'd in part, 705 F.2d 1526 (11th Cir. 1983), aff'd, 472 U.S. 38 (1985). Alabama's brief defending that judgment in this Court argued that the incorporated Establishment Clause should not proscribe the State's accommodation of school students' prayers. Pet. Br. at 37-43, *Wallace* v. *Jaffree*, *supra* (No. 83-812). This Court's decision in *Wallace* resoundingly rejected

[14] See *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality); *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Mergens*, *supra*; *Bowen* v. *Kendrick*, 487 U.S. 589 (1988); *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

the district court's "remarkable conclusion," 472 U.S. at 48, and reaffirmed as "firmly embedded in our constitutional jurisprudence" the "proposition that the several States have *no greater power* to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States," *ibid.* (emphasis added).[15] Ohio's partial incorporation theory should fare no better.

2. *RLUIPA leaves States free to make accommodation choices*

The respondents object (Resp. Cert. Br. 10-11) that RLUIPA exceeds the limits historically imposed by the Establishment Clause on the federal government because it entails the federal government lifting burdens imposed on religion by the States and thus interferes with "the States' authority to make policy choices in the 'play in the joints' between what the Establishment Clause prohibits and what the Free Exercise Clause requires."

That argument misunderstands how RLUIPA operates. In the vast majority of its applications to institutionalized persons and all of its applications to States, RLUIPA simply provides States with a choice.[16] If they choose to accept

[15] See also *Lee*, 505 U.S. at 620 n.4 (Souter, J., concurring) (the Court "unanimously incorporated the Establishment Clause into the Due Process Clause of the Fourteenth Amendment and, by so doing, extended its reach to the actions of States," and "not one Member of this Court has proposed disincorporating the Clause") (citation omitted); *id.* at 624 n.5 (were petitioners "arguing that the Establishment Clause is exclusively a structural provision mediating the respective powers of the State and National Governments," that "position would entail the argument, * * * which we would almost certainly reject, that incorporation of the Establishment Clause under the Fourteenth Amendment was erroneous").

[16] Every application of RLUIPA to the States is justified as Spending Clause legislation, because every state prison receives federal funding. See *FY 2003 Office of Justice Programs & Office of Community Oriented Policing Services Grants by State* (visited Dec. 15, 2004) <http:// www.ojp.usdoj.gov/fy2003grants>.

federal funds, they must agree to exercise their own authority in a way that avoids unwarranted burdens on religion. RLUIPA thus protects the *federal* interest in ensuring that *federal* funds do not contribute to unjustified burdens on religion, and preemptively prevents the federal government from contributing to the imposition of significant and unwarranted burdens on religion. At the same time, RLUIPA reflects Congress's "refus[al] to fund" activities that impose unjustified burdens on religious exercise "out of the public fisc." *Rust* v. *Sullivan*, 500 U.S. 173, 198 (1991). When States agree to accept federal funds subject to an agreement to lift their own burdens on religious exercise in a manner consistent with the Establishment Clause, there is no greater intrusion on state sovereignty than when a State agrees to alter its polices on race, gender, disability, age, or a host of other subjects with an eye to obtaining federal funds. Nor does an accommodation that a State could make on its own under the Establishment Clause somehow become constitutionally problematic just because the State's underlying motivation is less to "follow the best of our traditions," *Zorach*, 343 U.S. at 314, than to obtain federal funds.

The respondents' protestations about the States' historic autonomy to make accommodation decisions concerning their own resources in their own programs are beside the point. RLUIPA applies to this case because Ohio voluntarily chose to shed that autonomy and to integrate state and federal resources in prison management. The federal government has not unilaterally intruded into the State's operations. Ohio invited the federal government's partnership when it chose to accept federal funding for its prisons. See *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923).

Nor is it relevant that RLUIPA would impose obligations on hypothetical States that declined federal funds in those cases where the substantial burden implicated commerce. That concern is hypothetical because every State accepts federal funds. But, in any event, respondents cannot take a flawed Establishment Clause argument and a flawed Tenth Amendment argument and transform them into a valid Establishment Clause/Tenth Amendment argument. Government action that accommodates religious exercise by eliminating government burdens does not violate the Establishment Clause, and the States' traditional authority to decide the extent of their accommodation of religion is no different from countless other vital tasks of state government that give way to validly enacted federal legislation when those activities implicate interstate commerce.[17]

3. *The Establishment Clause protects religious liberty against both state and federal intrusion*

The respondents' argument that the First Amendment contains two different Establishment Clauses—one for the federal government and one for the States—misreads history. The starting point for that argument is the proposition that the Establishment Clause's central purpose in 1791 was to prevent federal interference with the established

[17] Beyond that, the problem in *Caldor* was not that the law pertained to burdens imposed by third parties. For that is precisely what Title VII's religious accommodation mandate does, 42 U.S.C. 2000e-2(a), which Congress enacted "to assure the individual additional opportunity to observe religious practices." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 70 (1986). Just as Congress may pass laws protecting federal funds, Congress may ensure that interstate commerce does not become a mechanism for unjustified or discriminatory burdens on religious exercise. See *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); see also *Caldor*, 472 U.S. at 712 (O'Connor, J., concurring) (requiring reasonable accommodation of religious practitioners is a proper component of an anti-discrimination law).

churches of the States. See Pet. at 12-13, *Bass* v. *Madison*, petition for cert. pending, No. 03-1404 (filed Apr. 6, 2004) (adopted at Resp. Cert. Br. 10-11). That no doubt was part of the Establishment Clause's genesis. See *Lee*, 505 U.S. at 641 (Scalia, J., dissenting). But the suggested corollary of the argument—that the Establishment Clause continues uniquely to disable the federal government from acting —does not follow.

a. First, the argument about the Clause's original federalist purpose proves too much. The entire Bill of Rights was designed as a constraint on the power of the federal government and the federal government alone. See, *e.g.*, *Adamson* v. *California*, 332 U.S. 46, 51 (1947), overruled in part on other grounds by *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Barron* v. *Mayor & City Council*, 32 U.S. (7 Pet.) 243, 247 (1833) (the entire Bill of Rights has no application to the States). By underscoring what the federal government could not do, the Bill of Rights highlighted what the States could do.

Accordingly, the "whole power over the subject of religion"—not just the establishment of religion—"[was] left exclusively to the state governments." Joseph Story, *Commentaries on the Constitution of the United States* § 1873 (1833); see *Permoli* v. *Municipality No. 1*, 44 U.S. (3 How.) 589, 609 (1845) (Free Exercise Clause inapplicable to States). Numerous States restricted the free exercise of religion in ways that the federal government could not. Several state constitutions, for example, specifically proscribed acts of worship that might disturb others or the peace and safety of the government.[18] The position of the respondents thus

[18] Ala. Const. art. I, § 5 (1819); Ala. Const. art. I, § 3 (1865); Cal. Const. art. I, § 4 (1849); Conn. Const. art. I, § 3 (1818); Ga. Const. art. LVI (1777); Me. Const., art. I, § 3 (1819); Md. Const., *Declaration of Rights*, art. 33 (1776); Md. Const., *Declaration of Rights*, art. 33 (1851); Md. Const., *Declaration of Rights*, art. 36 (1864); Md. Const., *Declaration of Rights*,

would compel the conclusion that the Free Exercise Clause likewise operates with reduced force on the States.

Indeed, the logic of respondents' position would lead to a sort of junior-varsity disincorporation of the entire Bill of Rights. For example, Thomas Jefferson was of the view that the First Amendment's protection for the press "reflected a limitation upon Federal power, leaving the right to enforce restrictions on speech to the States." *Dennis* v. *United States*, 341 U.S. 494, 522 (1951) (Frankfurter, J., concurring); see also *id.* at 522 n.4; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276-277 (1964) (same). Accordingly, early state laws permitted convictions for political libel and speech deemed to be abusive. *Dennis*, 341 U.S. at 521 (citing state laws from Massachusetts, Pennsylvania, Delaware, and Virginia). The Establishment Clause thus was not the singularly unique disability on the federal government that the respondents' argument posits, and no fair reading of history could limit their partial disincorporation theory to the Establishment Clause.

b. Second, focus on the original purpose of the Establishment Clause proves too little, because everything changed with the Fourteenth Amendment. By the time of the Fourteenth Amendment's enactment, established state churches were a distant memory,[19] and so the Establishment Clause as incorporated through the Fourteenth Amendment has been understood as a quintessential protection for

art. 36 (1867); Mass. Const. pt. I, art. II (1780); Minn. Const. art. I, § 16 (1857); Miss. Const. art. I, § 3 (1817); Miss. Const. art. XIII, § 4 (1832); Mo. Const. art. I, § 9 (1865); Nev. Const. art. I, § 4 (1864); N.H. Const. art. I, § V (1784); N.Y. Const. art. VII, § 3 (1821); N.Y. Const. art. I, § 3 (1846); S.C. Const. art. VIII, § 1 (1790); S.C. Const. art. IX, § 8 (1865).

[19] See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1437 (1990); Sanford H. Cobb, *The Rise of Religious Liberty in America* 513-517 (1902).

individual religious liberty and freedom of conscience.[20] The need to ensure individual protection against laws respecting an establishment of religion thus stood, at the time of the Fourteenth Amendment and certainly at the time of this

[20] See, *e.g.*, *Lee*, 505 U.S. at 609 (Blackmun, J., concurring) ("We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause."); *Engel* v. *Vitale*, 370 U.S. 421, 429, 432 (1962) (Establishment Clause reflects the Founders' view that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services," and the Fourteenth Amendment "reinforced" that principal because "governmentally established religions and religious persecutions go hand in hand"); *McGowan* v. *Maryland*, 366 U.S. 420, 460-461 (1961) (opinion of Frankfurter, J.) ("The general principles of church-state separation were found to be included in the [Fourteenth] Amendment's Due Process Clause in view of the meaning which the presuppositions of our society infuse into the concept of 'liberty' protected by the clause. This is the source of the limitations imposed upon the States."); *Everson*, 330 U.S. at 15 (noting that the Establishment and Free Exercise Clauses are "complementary" in protecting "religious freedom," such that the Fourteenth Amendment carries forward "the same application and broad interpretation" of the Establishment Clause); *ibid.* ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority."); *Cantwell*, 310 U.S. at 303 (the "fundamental concept of liberty embodied in" the Fourteenth Amendment "embraces the liberties guaranteed by the First Amendment"); *Davis* v. *Beason*, 133 U.S. 333, 342 (1890) (the First Amendment "was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relation to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper").

Court's incorporation decisions, on an equal footing with the other provisions of the Bill of Rights as a vital guarantor of individual liberty that is indispensable to "a free democratic government," *Lee*, 505 U.S. at 609 (Blackmun, J., concurring).

Moreover, it is clear that cementing Congress's power to protect and enforce the free exercise of religion against State intrusion was a matter of specific concern at the time the Fourteenth Amendment was enacted. Slavery's "incessant, unrelenting, aggressive warfare upon * * * the purity of religion," Cong. Globe, 38th Cong., 1st Sess. 1199 (1864) (Rep. Wilson), as well as the South's suppression of African-based slave religions and persecution of church-based abolitionist movements were frequently discussed by supporters of the Fourteenth Amendment.[21] The Schurz

[21] See, *e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson) (noting the South's "bitter, cruel, relentless persecutions of the Methodists"); *id.* at 2979 (1864) (Rep. Farnsworth) ("[T]he slave power got the control of the Government, of the executive, legislative, and judicial departments. Then it was that they got possession of the high places of society. They took possession of the churches."); Cong. Globe, 38th Cong., 2d Sess. 138 (1865) (Rep. Ashley) (the South "has silenced every free pulpit within its control, and debauched thousands which ought to have been independent"); Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull) (decrying law that criminalized "exercising the functions of a minister of the Gospel [by] free negroes") (citation omitted); Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871) (Rep. Bingham) ("[The States] restricted the rights of conscience, and he had no remedy. * * * Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these?"); *id.* at 310 (Rep. Maynard) (rights secured by the Fourteenth Amendment include freedom of religion); Cong. Globe, 42d Cong., 1st Sess. 428 (1871) (Rep. Beatty) (citing the "sworn testimony of ministers of the Gospel who have been scourged because of their political opinions"); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994).

Report, which Congress ordered to document conditions in the former confederate states after the war, noted a number of instances of religious persecution, including some through the use of facially neutral laws. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 81 (1865) (Southerners have invoked noise regulations to "suppress the religious meetings among the colored people"); *id.* at 100 ("[T]here is such a general expression of contempt for negro religion, and such a desire to suppress it, if possible, that it seems as if the whites thought it a piece of terrible impertinence for the blacks to worship the same God that we do.").[22] In the face of such abuses, the notion that the Framers of the Fourteenth Amendment intended to decamp on the subject of religious freedom, putting all their trust in the State governments' discretionary protection and accommodation of religious exercise, particularly of non-"traditional[]" faiths (Pet. App. B5), is unsustainable.[23]

[22] See also S. Exec. Doc. No. 2, *supra*, at 85 (regulations proposed authorizing only ordained ministers to preach and imposing a 10:00 p.m. curfew on meetings in order to suppress worship services of freed slaves); *id.* at 26 (citing instances of burning of "churches in which colored people assembled to worship," threats of assassination against "colored preachers," and murders of Northern preachers); *id.* at 69 ("[O]ne man was taken out of bed and killed because * * * he was a preacher."); *id.* at 72 ("[T]heir humble worship of God is construed as a designing plot to rise against the citizens who oppress them."); *id.* at 82 (freed slaves need "the free exercise of their right to worship God"); *id.* at 93 (zoning Negro churches out of town and requiring special permits for Negro preachers); *id.* at 94 (limiting Negroes to attendance at services conducted by white ministers).

[23] See S. Exec. Doc. No. 2, *supra*, at 25-26 (warning that, if federal "protection be withdrawn" and "the State authorities in full power," there cannot be even "the smallest expectation that * * * a northern citizen would be protected in the exercise of his constitutional right to teach and preach to the colored people," and, instead, "[we] shall look for a renewal of the fearful scenes in which northerners were whipped, tarred and feathered, warned off, and murdered, before the war") ; John P. Stevens,

The respondents' argument that Congress's legislative authority to protect and accommodate the free exercise of religion is less than the States' also ignores this Court's holding in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). In *Boerne*, the Court specifically held that Congress's "broad" power under Section 5 of the Fourteenth Amendment to enact prophylactic legislation enforcing the rights protected by Section 1 of the Amendment includes "enforcing the constitutional right to the free exercise of religion." *Id.* at 518-519. Section 5 thus specifically empowers Congress to "intrude[] into 'legislative spheres of autonomy previously reserved to the States,'" and to "prohibit[] conduct which is not itself unconstitutional." *Id.* at 518. Furthermore, the central mechanism for enforcing the free exercise of religion prophylactically or remedially is to require more protection than the Free Exercise Clause itself compels—to step legislatively into that "play in the joints" between the Free Exercise and Establishment Clauses. *Boerne* is thus an explicit recognition by this Court that Congress has the power—consistent with the Establishment Clause—to enact legislation that enforces the free exercise of religion and that influences or regulates the policy choices that States make about accommodating religious exercise. What the Establishment Clause permits under Section 5 of the Fourteenth Amendment, it also permits under the spending power and Commerce Clause.

The Bill of Rights: A Century of Progress, 59 U. Chi. L. Rev. 13, 20 (1992) ("[T]he Liberty Clause[] in the Fourteenth Amendment has transformed the Bill of Rights from a mere constraint on federal power into a source of federal authority to constrain state power.").

II. THE INSTITUTIONALIZED PERSONS PROVISION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IS A PROPER EXERCISE OF THE SPENDING POWER

The Constitution vests Congress with the authority to appropriate federal monies to promote the general welfare. U.S. Const. Art. I, § 8, Cl. 1. Congress also has corresponding authority under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, to protect against diversion of that money to purposes that Congress deems inconsistent with the public welfare. See *Sabri* v. *United States*, 124 S. Ct. 1941, 1946 (2004). To that end, "Congress may attach conditions on the receipt of federal funds," *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987), and "may fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). "The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place." *Sabri*, 124 S. Ct. at 1947.

"Money is fungible," and there is little doubt that "a federal grant * * * pouring in" one part of an agency program may loosen up funds for use in other parts of that program. *Sabri*, 124 S. Ct. at 1946. For those reasons, conditions attached to federal funding may be imposed on the complete program or project for which federal funds are disbursed and compliance can be required in all programmatic operations, without tracing federal funds to the particular transaction in dispute. *Ibid.* In addition, the spending power is "not limited by the direct grants of legislative power found in the Constitution," and even "objectives not thought to be within Article I's 'enumerated legislative fields,' * * * may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Dole*, 483 U.S. at 207 (quoting

United States v. *Butler*, 297 U.S. 1, 66 (1936)). Accordingly, "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

RLUIPA is a valid exercise of Congress's spending power because (i) its guarantee of even-handed protection for religion promotes the general welfare; (ii) RLUIPA puts funding recipients on clear notice of their obligations; (iii) and the condition imposed is reasonably related to the purposes for which the federal funds are expended. See *Dole*, 483 U.S. at 207-208.

A. RLUIPA Promotes The General Welfare

The respondents have not seriously contested that RLUIPA promotes the general welfare. Pet. App. B10. Nor could they. RLUIPA's funding conditions promote the general welfare by ensuring that federal money is not used to discriminate against faith groups or individuals or to impose unjustified and substantial burdens on religious exercise. Like the prohibitions on the use of federal funds in programs that discriminate on the basis of race, 42 U.S.C. 2000d, gender, 20 U.S.C. 1681(a), disability, 29 U.S.C. 794, and age, 42 U.S.C. 6102, RLUIPA insulates an important civil right against erosion, enhances equality, and ensures that substantial burdens are not imposed on religious exercise "by simple want of careful, rational reflection or from some instinctive mechanism to guard against people" whose religious exercises "appear to be different" and out of the mainstream." *Board of Trustees* v. *Garrett*, 531 U.S. 356, 374-375 (2001) (Kennedy, J., concurring). Indeed, this Court recognized in *Smith* that legislation like RLUIPA would promote constitutional values:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. Because "the concept of welfare or the opposite is shaped by Congress," Congress's judgment that RLUIPA promotes the general welfare merits substantial deference. *Helvering* v. *Davis*, 301 U.S. 619, 645 (1937); see *id.* at 640.[24]

B. RLUIPA Provides Unambiguous Notice Of Its Funding Condition

RLUIPA, on its face, provides States with unambiguous notice that the receipt of federal funds will require them to justify burdens on religion under RLUIPA's statutory standard. RLUIPA spells out the legal standards to govern the States' conduct, 42 U.S.C. 2000cc-1(a), and announces that those terms will govern any "program or activity that receives Federal financial assistance," 42 U.S.C. 2000cc-1(b)(1). Like Title VI, which bars discrimination on the basis of race, color, or national origin in "any program or activity receiving Federal financial assistance," 42 U.S.C. 2000d, Title IX of the Education Amendments of 1972, which bars discrimination on the basis of sex in any "educational program or activity receiving Federal financial assistance," 20 U.S.C. 1681(a), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C.

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[24] That deference is so great that, in *Dole*, the Court questioned "whether 'general welfare' is a judicially enforceable restriction at all." 483 U.S. at 207 n.2 (citing *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976)).

794, which prohibits discrimination on the basis of disability in "any program or activity receiving Federal financial assistance," 29 U.S.C. 794(a), RLUIPA provides unmistakable notice to the States of the "consequences of their participation" in receiving federal funds. *Dole*, 483 U.S. at 207.

The respondents have objected (Pet. App. B10) that RLUIPA's compelling interest test is too vague to allow States to comprehend the consequences of accepting funds. That argument is wrong for two reasons. First, the Constitution requires only that States be provided clear notice of the existence of a legal obligation and a legal standard governing their conduct. It does not require that "every improper expenditure" under the statute be "specifically identified and proscribed in advance." *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985); see *id.* at 669. For example, Title IX's ban on gender discrimination, 20 U.S.C. 1681(a), is valid even though its broad prohibition has been interpreted to proscribe conduct, such as student-on-student sexual harassment, that requires case-by-case, contextual, and fact-intensive inquiries to determine whether a violation occurred. See *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999) (level of actionable harassment turns upon "a constellation of surrounding circumstances, expectations, and relationships"); see also *Lau* v. *Nichols*, 414 U.S. 563 (1974) (Title VI's ban on racial discrimination, 42 U.S.C. 2000d-1, is valid spending legislation as applied to prohibit conduct with a racially disparate impact, and includes an obligation to adhere to Executive Branch regulations). Application of the Rehabilitation Act's mandate of accommodation for individuals with disabilities likewise requires case-by-case consideration. It is sufficient, for constitutional purposes, that each of those laws, like RLUIPA, announces the governing legal standard in clear

terms; Congress need not precisely script case-specific litigation outcomes in advance.

Second, the respondents' objection that RLUIPA's terms are unconstitutionally vague cannot withstand scrutiny. RLUIPA's statutory standard is borrowed from the constitutional standard that courts routinely applied to free exercise claims prior to this Court's clarification of the constitutional test in *Smith*, and that same standard continues to govern the conduct of numerous States as a matter of state law. See note 6, *supra*. In addition, that same standard continues to govern Ohio as a matter of federal constitutional law with respect to (i) any hybrid free exercise claims that (like petitioners' claim for access to literature) also implicate other constitutional rights, (ii) any laws that intentionally target religion, and (iii) any free exercise claims) that arise within governmental schemes providing for individualized consideration of private interests. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993); *Smith*, 494 U.S. at 881-885. RLUIPA thus employs a familiar standard that "has been used in Constitutional jurisprudence for at least the last 100 years." Pet. App. B12; see *Procunier* v. *Martinez*, 416 U.S. 396 (1974), overruled in part by, *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989).

In short, Ohio received federal funds knowing full well what the compelling interest standard means and with full knowledge that the standard would govern its religious accommodation decisions in state institutions. If Ohio is uncomfortable with operating under that legal test, its proper recourse is to forgo federal funding, not to take the money and then complain when it must keep its promises.[25]

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[25] The respondents' reliance on *Pennhurst*, *supra*, is misplaced. The problem in that case was that the language sought to be enforced against the State, which suggested that a State's treatment of persons with developmental disabilities should be the "least restrictive" of the person's

C. RLUIPA's Spending Condition Is Reasonably Related To The Purposes For Which State Prisons Receive Federal Funds

Like the prohibitions on racial and gender discrimination with respect to federal spending on which RLUIPA was modeled, H.R. Rep. No. 219, *supra*, at 14, RLUIPA directly advances the federal government's interest in ensuring that federally funded institutional programs do not impose unjustified burdens on religious exercise or discriminate in the accommodation process. Central to the spending power is the authority to "requir[e] that public funds, to which all taxpayers * * * contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in * * * discrimination." *Lau*, 414 U.S. at 569 (citation omitted). Just as other Spending Clause statutes prohibit discrimination on the basis of race, sex, age, and disability in federally funded programs, RLUIPA protects against the risk that federal funding may subsidize discrimination on the basis of religion or erode religious freedom by imposing reasonable conditions directly related to vindicating that purpose. "Whatever may be the limits" of Congress's spending authority, "they have not been reached" where Congress simply requires that the recipients of federal funds conduct the funded programs in a manner that is consonant with congressional attention to constitutional freedoms, even if the federal conditions are more protective than the Constitution itself. See *Lau*, 414 U.S. at 569 (Title VI disparate impact regulation falls within Spending Clause power as a means of avoiding the risk of federal involvement in racially discriminatory policies); see *Dole*, 483 U.S. at 206 (Congress "has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal

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personal liberty, 451 U.S. at 13 (quoting 42 U.S.C. 6010), was purely precatory, 451 U.S. at 12-13, 19, 23. RLUIPA's direct and mandatory language cannot plausibly be read as merely hortatory.

moneys upon compliance by the recipient with federal statutory and administrative directives"; citing *Lau*) (internal quotation marks omitted). RLUIPA's institutionalized persons provision thus "follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is designed to guard against unfair bias and infringement on fundamental freedoms." *Charles*, 348 F.3d at 607 (internal quotation marks omitted).

That is particularly true here, where the limitations on federal *funds* parallel the restrictions on federal *programs* under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb. Furthermore, the relationship between federal funds designated for the operations of institutional facilities and RLUIPA's protection of inmates' well-being is direct and targeted. Some of the funds received by Ohio "deal specifically with inmate rehabilitation," Pet. App. B13, and thus directly implicate RLUIPA's mandate for the even-handed and scrutinized accommodation of inmate religious practices during their rehabilitation. See *id.* at B7 (some federal funds are for "prisoner education, vocational training and assistance, and drug treatment"). Other funds are targeted for "operational efforts," while still others fund prisoner meals—an area of frequent request for religious accommodation. *Ibid.*; see *Madison*, *supra* (request for kosher diet denied).

The nexus between those activities and RLUIPA's mandate is close, far surpassing the linkage this Court found to be constitutionally sufficient in upholding the Hatch Act's broad restriction on the political activities of state employees. See *Oklahoma* v. *Civil Serv. Comm'n*, 330 U.S. 127 (1947) (across-the-board requirement that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take any "active part in political management") (quoting 18 U.S.C. 611). Moreover, the federal funds that

Ohio receives under the State Criminal Alien Assistance Program, Pet. App. B7, are unrestricted and may be used for *any* activity or purpose the recipient chooses, see 8 U.S.C. 1231(i); 42 U.S.C. 13710, which underscores the fungibility of federal funding in the institutional context and thus the justification for RLUIPA's program-wide coverage. Cf. *Sabri*, 124 S. Ct. at 1946 (noting the fungibility of federal funding). In short, the Constitution requires only a reasonable fit between RLUIPA's standard and the purpose of federal funding—not a perfect fit in every isolated application of the law—and that standard is amply satisfied here.

III. WHEN THE COMMERCE CLAUSE JURISDICTIONAL ELEMENT IS TRIGGERED, THE INSTITUTIONALIZED PERSONS PROVISION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IS A PROPER EXERCISE OF THE COMMERCE CLAUSE POWER

In addition to requiring compliance with RLUIPA's standard by recipients of federal funds, Congress directed that RLUIPA's institutionalized persons provision would apply in individual cases where imposition or removal of the substantial burden on religion "would affect commerce with foreign nations, among the several States, or with Indian tribes," 42 U.S.C. 2000cc-1(b)(2), unless that affect on commerce, in the aggregate, would not be substantial, 42 U.S.C. 2000cc-1(g). No finding has been made that the Commerce Clause authority is implicated in this case. Quite the opposite, the district court refused to address the issue because of unresolved factual and legal questions about "the relationship between the internal operation of state prisons and interstate commerce." Pet. App. B9. The court of appeals did not address the Commerce Clause question either. *Id.* at A8. It thus would be premature for this Court to address the constitutionality of RLUIPA's Commerce Clause applications "in advance of the necessity of deciding

it." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); see, *e.g.*, *Ashcroft* v. *Oakland Cannabis Buyers Cooperative*, 532 U.S. 483, 495 n.7 (2001) (declining to reach Commerce Clause issue that was not addressed by the court of appeals).[26]

In any event, the Commerce Clause provision is facially constitutional. Congress has the power to regulate both interstate and intrastate activities that have a substantial effect on commerce. *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995). By making proof of precisely that connection to commerce an indispensable jurisdictional element in each case where the Commerce Clause authority is invoked, Congress ensured that RLUIPA will only apply in those cases where the constitutionally required nexus to commerce is both present and concrete. RLUIPA's language also evidences Congress's intent to exercise "the fullest jurisdictional breadth" that is "constitutionally permissible under the Commerce Clause,"—no more, but also no less. *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam); accord *Jones* v. *United States*, 529 U.S. 848, 854 (2000).

Triggering federal regulatory obligations upon satisfaction of such a jurisdictional element is a constitutionally permissible exercise of Congress's Commerce Clause power. Indeed, RLUIPA's provision parallels the commerce element in the Hobbs Act, 18 U.S.C. 1951(a), which this Court upheld as proper Commerce Clause legislation in *United States* v. *Green*, 350 U.S. 415, 420-421 (1956).[27]

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[26] Nor is there any conflict in the circuits on the question. In fact, the Commerce Clause provision is rarely invoked because the vast majority of RLUIPA's institutionalized person cases arise in state prisons, all of which receive federal funding. See note 16, *supra*.

[27] See also *United States* v. *Morrison*, 529 U.S. 598, 612 (2000) (inclusion of a jurisdictional element "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce"); *Lopez*, 514

Congress's reliance on its Commerce Clause power, moreover, reflects the reasonable judgment that, just as in free society, governmental regulation of inmates' diets, clothing, literature, and other property can have a substantial effect on interstate commerce. See, *e.g.*, *Joint Stmn.*, 146 Cong. Rec. at S7775 (burdens that "prevent[] a specific economic transaction in commerce, such as * * * an interstate shipment of religious goods" can have, in the aggregate, a substantial effect on commerce); *Charles*, 348 F.3d at 605 ("Inmates purchase religious and other personal property with personal funds."). Indeed, many prison systems, including Ohio's, operate prison industries that pay inmates wages, employ materials from other States, and produce goods for sale in the marketplace, generating tens of millions of dollars in annual revenue.[28] In Congress's experienced judgment, "[t]he aggregate of all such transactions is obviously substantial, and this is confirmed by data presented to the House Subcommittee on the Constitution." *Joint Stmn.*, 146 Cong. Rec. at S7775.

U.S. at 561 (jurisdictional element "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

[28] See Pet. App. B7 (Ohio Prison Industries use raw materials produced in other States to manufacture shoes, beds, furniture, and mulch, for sale in Ohio and other States); *OPI Corr. Indus.* (visited Dec. 15, 2004) <http://www.opi.state.oh.us/about_OPI/about.OPI.asp> (Ohio Penal Industries had $30 million in sales in FY2002); cf. *United States* v. *Darby*, 312 U.S. 100, 115-116 (1941) (Congress may proscribe the use of interstate commerce to market goods produced under labor conditions that are adverse to federal policy); *Kentucky Whip & Collar Co.* v. *Illinois Cent. R.R.*, 299 U.S. 334, 343-352 (1937) (Commerce Clause power extends to the regulation of prison labor); see generally *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (commerce power extends to legislation "to foster, protect, control and restrain").

IV. THE INSTITUTIONALIZED PERSONS PROVISION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT COMPORTS WITH THE TENTH AND ELEVENTH AMENDMENTS

A. The Tenth Amendment

RLUIPA is wholly consistent with the Tenth Amendment. That is because the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *New York* v. *United States*, 505 U.S. 144, 156 (1992) (quoting *United States* v. *Darby*, 312 U.S. 100, 124 (1941)). Because RLUIPA is a valid exercise of Congress's spending and Commerce Clause power, Congress's exercise of its constitutionally assigned powers cannot run afoul of the Tenth Amendment. Moreover, because RLUIPA's application to the respondents reflects an exercise of Congress's spending authority, their Tenth Amendment argument is foreclosed by *Dole*. There is "no violation of the State's sovereignty because the State could * * * adopt the simple expedient of not yielding" to the offer of funding. 483 U.S. at 210 (quoting *Oklahoma*, 330 U.S. at 143); see *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983) ("Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty."); *Oklahoma*, 330 U.S. at 143-144 (regulation of political activities of public employees under spending authority poses no Tenth Amendment problem).

Nor would application of RLUIPA to this case through the Commerce Clause power implicate the Tenth Amendment. RLUIPA simply requires the State, when its conduct has a substantial effect on interstate commerce, "to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them." *EEOC* v. *Wyoming*, 460 U.S.

226, 239 (1983). Indeed, the fact that "a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988); see *Reno* v. *Condon*, 528 U.S. 141 (2000). RLUIPA, moreover, is a calibrated limitation on state action. It imposes no flat prohibitions or blanket rules. Rather, Congress simply legislated a statutory standard with which courts and States are already familiar, and which balances States' interests against the individual's religious liberty. See *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment) (compelling interest test "strike[s] sensible balances between religious liberty and competing state interests").

Furthermore, RLUIPA does not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 176 (citation omitted). RLUIPA simply requires that whatever prison operations the State chooses to undertake be accomplished consistent with federal norms when they implicate federal funds or interstate commerce, just as States currently must conduct their prison systems within the constraints of Title VII, 42 U.S.C. 2000e, Title VI, 42 U.S.C. 2000d, Title IX, 20 U.S.C. 1681(a), the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*

B. The Eleventh Amendment

The respondents' Eleventh Amendment argument fares no better. First, petitioners filed suit only against state officers in their official capacity, and not against the State or any state agencies. Their claims for prospective declaratory and injunctive relief thus fall squarely within *Ex parte*

Young, 209 U.S. 123 (1908). See also *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002).[29]

Second, by accepting federal funds conditioned on compliance with RLUIPA's terms, including its provision for private enforcement, the State waived its Eleventh Amendment immunity. See *Florida Prepaid*, 527 U.S. at 686-687.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[29] Petitioners' claim for money damages poses an antecedent question of statutory construction concerning whether RLUIPA's authorization of "appropriate relief" encompasses monetary damages. Cf. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992). That predicate question, which was not addressed below and which is not embraced within the question presented, must be resolved before the Court could address the Eleventh Amendment question. See *Garrett*, 531 U.S. at 360 n.1.

APPENDIX A

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Article I, Section 8, Clause 1 of the United States Constitution provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

3. Article I, Section 8, Clause 3 of the United States Constitution provides:

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

4. Article I, Section 8, Clause 18 of the United States Constitution provides:

The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution for the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

APPENDIX B

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. § 2000cc through 2000cc-5, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Land Use and Institutionalized Persons Act of 2000".

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS.—

(1) GENERAL RULE.—No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION.—This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION.—

(1) EQUAL TERMS.—No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION.—No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS.—No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE.—No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of

general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION.—This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION.—A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION.—If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT.—Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended—

(1) by inserting "the Religious Land Use and Institutionalized Persons Act of 2000," after "Religious Freedom Restoration Act of 1993,"; and

(2) by striking the comma that follows a comma.

(e) PRISONERS.—Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT.—The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION.—If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED.—Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED.—Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED.—Nothing in this Act shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE.—A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or

practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW.—With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION.—This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL.—Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY.—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establish-

ment Clause, shall not constitute a violation of this Act. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS.—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended—

(1) in paragraph (1), by striking "a State, or a subdivision of a State" and inserting "or of a covered entity";

(2) in paragraph (2), by striking "term" and all that follows through "includes" and inserting "term "covered entity" means"; and

(3) in paragraph (4), by striking all after "means" and inserting "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.".

(b) CONFORMING AMENDMENT.—Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking "and State".

SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT.—The term "claimant" means a person raising a claim or defense under this Act.

(2) DEMONSTRATES.—The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE.—The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT.—The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION.—The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY.—The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE.—

(A) IN GENERAL.—The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE.—The use, building, or conversion of real property for the purpose of religious exercise shall be con-

sidered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

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No. 03-9877

In The Supreme Court Of The United States

JON B. CUTTER, et al.,

Petitioners,

v.

REGINALD WILKINSON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does application of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), codified in relevant part at 42 U.S.C. § 2000cc-1, to prisons violate the Establishment Clause or other constitutional limitations on Congress's powers?

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INTRODUCTION

Petitioners and their supporters fail to meaningfully address a key aspect of this case. They want it to be solely about whether, and to what extent, States may accommodate religion. But this case is about much more. It also asks whether Congress can demand that States provide religious accommodations in their prisons—accommodations that go beyond those the Constitution requires, and that compromise prison security. The answer to that question is "No."

Through the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. ("RLUIPA"), Congress does not regulate religion directly. Rather it tries to regulate the States' treatment of religion. Moreover, Congress does so in the context of state prison administration, an area in which the Court has recognized that State interests are particularly acute. See *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest . . . than the administration of its prisons."). And Congress does so through a particularly blunt instrument. It does not merely provide state prisoners with religious exemptions to a particular regulation or type of regulation. Instead, it mandates the standard States must apply in making their religious accommodation decisions in prisons. In other words, RLUIPA is far more than an accommodation. It is a powerful tool that prisoners advancing religious claims can use to obtain accommodations. And the standard Congress mandates—strict scrutiny—is the most demanding test known to constitutional law.

This dramatic enhancement of prisoners' rights—accomplished through wholesale trampling of the States' sovereign rights, both to control their prisons, and to decide on appropriate religious accommodations—violates the Constitution in two separate ways. First, RLUIPA, as applied in prisons, violates the Establishment Clause. The Act gives

prisoners who clothe their demands in religious garb a benefit unavailable to other prisoners. In prison's unique setting, where State control of inmates' lives is pervasive, and providing benefits for some inmates necessarily imposes costs on others, this has the constitutionally-impermissible effect of advancing religion. Moreover, as a command from Congress to the States, the Act separately violates the federalist principle embedded in the Establishment Clause, which reserves to the States the sovereign power to control their own treatment of religion.

Second, RLUIPA exceeds the scope of Congress's enumerated powers. Congress cannot rely on its Spending Clause power, as none of the spending to which RLUIPA's conditions apply is programmatically related to the restrictions that RLUIPA imposes. Moreover, even if it were, certain aspects of state governance, such as a State's religious policy choices, are irrevocably assigned to the States by our constitutional design, and thus are beyond Congress's ability to purchase through its spending powers. Nor can Congress rely on its commerce power as that power is limited to "economic endeavors." Neither prison administration, nor religion—the activities toward which the RLUIPA provision at issue here is directed—qualify. Moreover, RLUIPA, as Commerce Clause legislation, also violates the Tenth Amendment. That amendment specifically prevents Congress from using its commerce power to regulate State regulation, as it attempts to do here.

RLUIPA's unconstitutional intrusion on the States' management of their prisons imposes drastic consequences. The Court itself has recognized the "Herculean obstacles" to effective prison management, and the "complex and intractable" nature of the problems that prison officials face. *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974). RLUIPA's unconstitutional mandate adds to that burden by facilitating gang activity within prison walls, thereby dramatically compromising prison officials' abilities to

provide a safe environment for their charges. Accordingly, we urge the Court to declare the statute unconstitutional as applied there.

STATEMENT OF THE CASE

Several sets of facts are relevant here: RLUIPA's substantive standard, that standard's impact on prison operations, the facts underlying these consolidated cases, the nature of the federal funding triggering RLUIPA's applicability, and the proceedings below.

A. RLUIPA resurrects RFRA's least restrictive means test.

Through RLUIPA, Congress tells States how to respond to prisoners' religious requests. Section 3 of the Act prohibits governments from substantially burdening a prisoner's religious exercise unless the burden "is the least restrictive means" to further "a compelling governmental interest." That is identical to RFRA's standard. Compare 42 U.S.C. § 2000bb-1(a), with *id.* § 2000cc-1(a). All agree that this standard demands more from the States than the Constitution requires. Cf. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987).

B. The least restrictive means test disrupts prison operations.

The record contains substantial uncontested evidence that the least restrictive means test disrupts day-to-day prison operations. That is true in three related respects.

1. First, it makes it more difficult for States to preserve security by making "it harder for prison staff to regulate or prevent actions purportedly taken for religious reasons." J.A. 234–35. The extent of that problem is illustrated by several well-documented realities of prison life. For instance, prison gangs often claim religious status to further their illicit ends. *Id.* at 129, 131–32, 202, 210–11; Anti-Defamation League, *Dangerous Convictions: An*

Introduction to Extremist Activities in Prisons 7, 10, 34–35, 37–38 (2002); *In the Belly of the Whale: Religious Practice in Prison*, 115 Harv. L. Rev. 1891, 1903 (2002); National Institute of Corrections, Prison Gangs: Their Extent, Nature and Impact on Prisons 120, 141, 154, 158, 175 (1991); 139 Cong. Rec. S14355 (daily ed., Oct. 26, 1993). Gangs also use religious gatherings to circumvent the States' efforts to control their activities, and inmates use those events to pass contraband. J.A. 234, 235; H. Dammer, *The Reasons for Religious Involvement in the Correctional Environment*, 35 Journal of Offender Rehabilitation No. 3/4, at 35, 42–49 (2002). Officials have documented gangs' abuse of religious visits for drug smuggling. J.A. 236–39; S. Frey, Comment: *Religion Behind Bars: Prison Litigation under the Religious Freedom Restoration Act in the Wake of* Mack v. O'Leary, 101 Dick. L. Rev. 753, 772–73 (1997). Courts and commentators recognize that inmates abuse religion to obtain exemptions from grooming codes intended to suppress contraband. *Lewis v. Scott*, 1995 U.S. Dist. Lexis 20276, at *10–11 (E.D. Tex. Jan. 18, 1995). Those are not isolated occurrences: "most states responding" to a national survey on RFRA's effects "indicated that this pattern is being employed by racial hate groups, such as the Aryan Nation." J.A. 211.

2. Those dynamics have caused a dramatic upsurge in "religious" demands, diverting significant staff time from other pressing matters to respond to those demands. The national survey reported "significant increases in the number, belligerency, and unusual nature of inmates' [] demands for 'religiously motivated' alterations to . . . prison regulations." *Id.* at 211–12. It further noted that "[t]he large number of those requests, together with [the] 'least restrictive means' requirement, [] result[s] in very significant burdens on the already overburdened corrections staffs." *Id.* at 212; see also *id.* at 200, 204–05.

3. Finally, RLUIPA's standard has decreased the religious opportunities available to inmates in two ways.

Quantitatively, the increased demands on staff time limit the time that chaplains, who are heavily involved in vetting the prisoners' religious demands, can devote to developing and delivering religious programming. *Id.* at 200–01. Qualitatively, the increased frequency and stridency of inmates' demands, along with the chaplains' obligations to vet each demand, combine to degrade prison chaplains' relationships with inmates. *Id.* at 206.

C. The facts of these cases.

The three cases combined here, *Gerhardt v. Lazaroff*, *Cutter v. Wilkinson*, and *Miller v. Wilkinson*, exemplify the pattern of prisoners using RLUIPA to challenge reasonable security regulations.

1. These inmates are prone to violence. The plaintiff in *Gerhardt* was convicted for conspiring to bomb the school attended by the daughter of a judge presiding over a desegregation case. The court affirming his conviction found that "[w]hile [] Gerhardt insist[s] that [he was] without predisposition to commit violent acts, []a great deal of evidence . . . suggest[s] otherwise." J.A. 242.

The *Miller* plaintiffs also have violent backgrounds. Most have documented affiliations with prison gangs, including the Aryan Brotherhood, the Ku Klux Klan, and skinhead groups. *Id.* at 136, 138–40, 144–45, 147–49, 151, 153–55, 168, 169–71. Some have acted as "enforcers" or taken other leadership positions in those groups, *id.* at 147, 149, 151, 178, 180–83, and several have been involved in racially motivated killings or assaults, some since this case began, *id.* at 148, 154, 161, 181.

2. The religious sects at issue preach violence and are closely identified with violent gangs. A leading evangelist of Christian Identity, the creed underlying *Gerhardt*, taught that "violence solves everything," while another evangelist declared that "[t]here isn't a Jew on this earth that deserves to

live." Aryan-Nations.org, at www.aryan-nations.org (last visited Feb. 11, 2005). Leaders in the Odinist/Asatru movement, the faith driving the *Miller* case, call for "nothing less than total, uncompromising war." M. Gardell, Gods of The Blood, 199 (2003). In their view "[t]he only chance the White Race has of surviving is through violence and terrorism. The Mud Races will never leave peacefully." *Id.* at 181. Given their theologies, it is hardly surprising that those creeds are linked with white supremacist organizations that have killed law enforcement officers, and committed bank robberies and bombings. J.A. 165–66; FBI, Project Megiddo 15–17, 19–20 (1999); Southern Poverty Law Ctr., *Identity Crisis: Expanding Race-Hate Faith Underlies Movement*, Intelligence Report No. 89 (1998), available at www.splcenter.org/intel/intelreport/article.jsp?pid=755; Southern Poverty Law Ctr., *The New Romantics*, Intelligence Report No. 101 (2001), available at www.splcenter.org/intel/ntelreport/article.jsp?aid=236.

These violent groups are especially active behind bars. Anti-Defamation League, *supra*, at 33–40; Southern Poverty Law Ctr., *The New Barbarians: New Brand of Odinism on the March*, Intelligence Report No. 98 (1999), available at www.splcenter.org/intel/intelreport/article.jsp?aid=451; Gardell, *supra*, at 277. In Ohio alone, they helped start a riot resulting in ten deaths, and they have also been responsible for several other killings. J.A. 159, 160, 163, 231–32. They are the most sophisticated gangs Ohio confronts. J.A. 167–68, 173–74, 231.

3. The nature of their "religious claims" is also typical. *Gerhardt* and *Miller* ask for group services that would undermine officials' efforts to keep gang members separate from each other. *Id.* at 234–35. *Cutter* and *Gerhardt* seek access to publications that prisoners display as gang identifiers and that contain foreign languages gangs have used as codes. *Id.* at 233–34. *Miller* seeks exemptions from

grooming regulations that prevent inmates from wearing their hair in ways signifying gang affiliation.

D. ODRC's federal funding.

ODRC was receiving approximately $25 million in federal funding annually as of RLUIPA's effective date. That funding comes in 22 separate grants, in such specific areas as prison construction, sentencing policy, educational programs and drug treatment. *Id.* at 243–50, 320–22, 328–62. None of those programs deal with religious exercise, and no one claims that the religious burdens alleged here interfered with the programs, or Petitioners' ability to benefit from them.

E. The proceedings below.

Petitioners advanced their RLUIPA claims immediately after the statute was enacted. Ohio moved for summary judgment in each of the three cases, supported by depositions, affidavits, and stipulated facts, arguing that RLUIPA is unconstitutional as applied in the prison setting.[1] Ohio argued that RLUIPA violates the Establishment Clause and the Tenth Amendment, and that it exceeds Congress's powers under the Spending and Commerce Clauses. The magistrate recommended denying the motions, and the district judge adopted the recommendation over the State's objections. Pet. App. B5.

Respondents appealed, and the Sixth Circuit reversed. It concluded, for two reasons, that RLUIPA, in the prison setting, has the primary effect of advancing religion. First, it found that "RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights." Pet. App. A5. The court illustrated that by contrasting the differing rights of secularly and religiously motivated inmates demanding the same white supremacist literature.

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[1] Those motions were styled as motions to dismiss, but both sides' submission of evidence converted them to summary judgment motions.

See *id.* at A6–A7. If the former challenged denial of such literature, the "court would evaluate these claims under the deferential rational relationship test in *Turner*, placing a high burden of proof on the inmate and leaving the inmate with correspondingly dim prospects of success." *Id.* at A6 (quoting *Madison v. Riter*, 240 F. Supp. 2d 566, 576 (W.D. Va. 2003)). But a religiously-motivated inmate, helped by RLUIPA's strict scrutiny, would have "a much better chance of success than the non-religious white supremacist, as prison officials bear the burden of proving that the prison policy satisfies a compelling interest and is the least restrictive means of satisfying the interest." Pet. App. A7. The court concluded that such disparate treatment, based entirely on a claimant's religious status, violated the mandate of religious neutrality—"the fundamental requirement of the Establishment Clause." *Id.* at A4.

Second, the court found that, because RLUIPA enhanced religious inmates' ability to escape disagreeable aspects of the prison routine, it "has the effect of encouraging prisoners to become religious in order to enjoy greater rights." *Id.* at A7. The court also concluded that RLUIPA is not a proper accommodation under *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), as, unlike the law there, RLUIPA is not necessary to avoid a constitutional violation. Pet. App. at A4–A5, A7–A8. This appeal followed.

SUMMARY OF ARGUMENT

RLUIPA gives prisoners a powerful weapon: the right to use religious demands—demands for accommodations beyond what the Constitution requires—to force State prison officials to change the way they manage prisons. As such, RLUIPA is an unprecedented federal intrusion on both the States' sovereign rights to control their prisons, and their sovereign right to make their own decisions—subject only to constitutional limits—regarding religious accommodations.

In giving state prisoners this weapon, Congress both transgressed the Establishment Clause, and exceeded its enumerated powers.

The Establishment Clause limits both Congress's power to regulate individuals and its power to regulate States. RLUIPA violates both limits. First, while Congress is free to adopt appropriate religious accommodations to burdens it has imposed, RLUIPA goes far beyond that. It is not merely an accommodation, but a pro-religious tool for seeking accommodations, and it does not remove burdens that Congress has imposed, but rather those imposed by a separate sovereign, the State. In prison's unique environment, where benefits for some impose burdens on others, and very little goes unnoticed by prisoners, RLUIPA has the impermissible effects of advancing religion and strongly encouraging religiosity.

RLUIPA also violates federalist principles enshrined in the Establishment Clause. Our constitutional design secures to the States the right to make their own choices regarding religious accommodations. In doing so, the States are, of course, governed by the same limitations the federal government faces in its regulation of individuals under the Free Exercise and Establishment Clauses. But within the "play in the joints" between those two, the States are not subject to congressional second-guessing.

Even if RLUIPA did not violate the Establishment Clause, it is also beyond the grasp of Congress's enumerated powers. Congress seeks to rely on its spending and its commerce powers, but neither justifies the foray into exclusive areas of State sovereignty that Congress undertakes here.

The spending power is limited in two ways, both of which prevent Congress from relying on it to enact RLUIPA. First, under *South Dakota v. Dole*, 483 U.S. 203 (1987), the conditions that Congress attaches to State funding must be

programmatically related to the projects Congress funds. But none of Congress's state prison funding is in any way related to the religious interests that RLUIPA advances. Second, the States' right to control their religious policy choices (within the "play in the joints") is inalienable. The Constitution assigns such choices exclusively to the States, as a structural mechanism for guaranteeing religious liberty by dispersing governmental power over religion. Thus, Congress is not free to buy, and the States are not free to sell, this aspect of State sovereignty.

Nor does the Commerce Clause provide Congress the power to enact RLUIPA. The commerce power, while broad, is limited to control over "economic endeavors." None of the activities to which RLUIPA is directed qualify. And because the activities are non-commercial in nature, their impact on interstate commerce, if any, is simply irrelevant. That renders RLUIPA's jurisdictional limitation (to acts that in the aggregate affect interstate commerce) insufficient to save the Act. Moreover, the Tenth Amendment independently bars Congress from using its commerce power to regulate State regulation, as Congress tries to do through RLUIPA.

The question presented is not whether inmates should be permitted to practice religion. Prison officials should and do accommodate religious practices. But these officials must also accommodate many other competing concerns. The test established in *Turner v. Safley*, 482 U.S. 78 (1987), properly recognized the realities of prison management and the appropriate limitations on prison officials. Congress's attempt to overturn that test violates the Constitution.

ARGUMENT

A. RLUIPA violates the Establishment Clause.

The Establishment Clause limits Congress's power over religion in two distinct ways. First, in its "libertarian aspect," the Clause limits Congress's (and after incorporation, a

State's) power to impose religious regulations on individuals.[2] Second, and equally important, the Clause's "federalist aspect"—and indeed, our constitutional structure as a whole—also limits Congress's authority to intermeddle with a State's treatment of religion. That is, the *State* has the right to make policy within the "play in the joints" between the Establishment and Free Exercise Clauses, *Locke v. Davey*, 540 U.S. 712, 718 (2004), and Congress may not order us to pick a different point in that spectrum. RLUIPA's prison provision violates both aspects of the Establishment Clause.

1. RLUIPA, as applied in prisons, has the primary effect of advancing religion.

A law violates the libertarian aspect of the Establishment Clause if its primary effect is to advance religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). RLUIPA, in prison's unique setting, has multiple features independently evincing that effect: it is not religiously neutral, it provides unprecedented incentives for religiosity, it imposes significant burdens on third parties, and it forces government to become more deeply entangled with religion. Any one of those features, amplified by prison dynamics, is fatal to RLUIPA's validity. Combined, they push it well beyond constitutional limits.

a. RLUIPA is not religiously neutral.

The neutrality principle lies at the very "heart of the Establishment Clause." *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 704 (1994). And contrary to the federal government's suggestion, see U.S. Br. at 15–18, that principle does not merely forbid the government from preferring "one religion to another," but also from preferring "religion to irreligion." *Kiryas Joel*, 512 U.S. at 703. Indeed,

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[2] With incorporation, this restriction applies with equal force to State governments. See below at 25.

one member of the Court opined that RLUIPA's predecessor, RFRA, was an invalid "'law respecting an establishment of religion," precisely because it provided the religious "with a legal weapon that no atheist or agnostic can obtain." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (Stevens, J., concurring). While Ohio does not contend that such accommodations would be invalid outside prison walls, the unique prison environment brings RLUIPA's dramatic enhancement of religious rights into direct conflict with the Establishment Clause.

1. Religious neutrality has long been the cornerstone in the Court's religion clause jurisprudence. See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792–93 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Sch. Dist. v. Schempp*, 374 U.S. 203, 225–26 (1963). These neutrality concerns are especially significant where, as here, a statute *expressly* treats individuals differently based on their religion or irreligion. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15–17 (1989) (plurality opinion).

Indeed, perhaps the Court's strongest Establishment Clause mandate is that the government may not treat people, based solely on their religious beliefs, as "insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). Consistent with that principle, the Court has struck laws that conferred a "valued and desirable benefit only on those [] who adhere to a particular religious belief," *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring), or that gave benefits to religious entities because of their religious status, *Texas Monthly*, *supra*. As the Court said in *Nyquist*, "[s]pecial [] benefits . . . cannot be squared with the principle of neutrality." 413 U.S. at 793; see also *Kiryas Joel*, 512 U.S. at 703.

That is not to say (and, despite Petitioners' contrary assertions, see Pet. Br. at 17–18, Ohio does not say), that all

religious accommodations violate the Establishment Clause. To be sure, as both the federal government and Petitioners note, the Court has upheld various religious accommodations. See *Zorach v. Clauson*, 343 U.S. 306, 312–14 (1952). And, as the *Texas Monthly* dissent noted, every religious accommodation, by its very nature, violates a strict neutrality principle. 489 U.S. at 40 (Scalia, J., dissenting). But as the Court has also repeatedly recognized, and as the *Texas Monthly* dissent agreed, some "accommodation[s] slide[] over . . . into favoritism." *Id.* The question is one of degree. While drawing the exact line may be difficult, the accommodation here is so overwhelming that it clearly crosses that line, whatever its precise location.

2. RLUIPA gives religious inmates greatly enhanced rights precisely because they are religious. And the magnitude of that enhancement far surpasses any case the Court has yet considered. RLUIPA does not merely provide an exemption to a particular tax, as in *Texas Monthly*. Nor does it simply draw a particular school district boundary to provide a religious benefit, as in *Kiryas Joel*. Rather, it gives religious inmates a powerful weapon to gain exemptions from whatever prison regulations they wish. That is, RLUIPA is not merely an accommodation; it is a pro-religious rule about making accommodations. It elevates the status of its beneficiaries across the board in an obvious way that, as discussed below, has "ripple effects" throughout an entire prison.

The magnitude of the benefits RLUIPA provides is best understood by comparing the rights of secular and religious prisoners. Inmates challenging prison regulations on secular grounds must prove that those regulations are not reasonably related to penological interests. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). Inmates must provide "substantial evidence" that the regulation is inappropriate, *Pell v. Procunier*, 417 U.S. 817, 827 (1974), and reasons that would be "unimpressive if . . . submitted as justification" for restricting "the general

public" suffice to sustain actions restricting even prisoners' fundamental rights, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 133 n.9 (1977) (quotation marks omitted). Far from strict scrutiny, the standard upholds the regulation unless "the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost." *Overton*, 539 U.S. at 136. In short, inmates must rebut the "presumption that [] prison officials acted within their broad discretion." *Shaw v. Murphy*, 532 U.S. 223, 232 (2001) (quotation marks omitted).

RLUIPA, by contrast, gives religious inmates attacking the same regulation the benefit of strict scrutiny, a regimen that makes official action "presumptively invalid." *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990) (emphasis omitted). Prison officials, not prisoners, have the burden of proof, and it is a heavy one. They must convince federal courts that a restriction serves a compelling government interest. More important, they must also show that the disputed practice is the least restrictive means to do so, a very difficult task in its own right. After all, "every administrative judgment [is]," as a practical matter, "subject to the possibility that some court somewhere would conclude that [prison officials] had a less restrictive way of solving the problem at hand." *Turner*, 482 U.S. at 89. That is why the Court has described that standard as "the most demanding test known to constitutional law." *Boerne*, 521 U.S. at 534.

In sum, RLUIPA transforms imprisoned litigants—based solely on their religion—from presumptive losers to presumptive winners. Indeed, inmates have greater rights to demand religious accommodations than free citizens. *Smith*, *supra*.

3. If that were not enough, prison's unique dynamics amplify the effects of that disparity. With few distractions, "inmates are watchful," J. Katz, *Tips on Managing Inmates:*

The Tricks of the Trade, VII Corrections Managers' Report 84 (2002), and "when an inmate perceives that . . . he or she is being treated . . . unequally that is their reality." T. Stewart & D. Brown, *Developing a Training Curriculum and Facility to Enhance Staff Safety in Corrections Work*, VIII Corrections Managers' Report 19 (2002). Consequently, "differences in treatment that outside of prison would be understood as making a religious adherent whole, are likely in prison to be perceived as favoritism and thus to engender resentment." *In the Belly of the Whale*, *supra*, at 1899. Thus, special religious privileges in prisons "create problems as other inmates [see] that a certain segment [of the prison population] is escaping a rigorous [requirement] and perceive favoritism." *O'Lone*, 482 U.S. at 353 (quotations marks omitted). In short, considering the unique prison environment in which it applies, RLUIPA's departure from religious neutrality has far greater effects than any other law considered by the Court.

b. RLUIPA creates powerful incentives for religiosity.

The Establishment Clause bars government from promoting religious inculcation, and both the Clause's history and the Court's precedents teach that bestowing benefits on religion may amount to promotion. The Framers were concerned about "extraordinary privileges, by which proselytes may be enticed." J. Madison, Memorial and Remonstrance Against Religious Assessments, ¶ 4 (1785). And the Court has not hesitated to strike State attempts to foster religious practice, even if the State does so only by "subtle and indirect" means. *Lee v. Weisman*, 505 U.S. 577, 593 (1992); accord, *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (condemning "the indirect coercive pressure" to engage in religious practices); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 306 (striking policy that "by its terms, invites and encourages religious messages"). Even in upholding laws, the Court has expressly noted that the government may not

"creat[e] a[n] [] incentive to undertake religious indoctrination." *Agostini v. Felton*, 521 U.S. 203, 231 (1997). RLUIPA, in concert with the realities of prison, violates this principle by encouraging inmates to "get religion."

While religious accommodations are typically not an impermissible incentive for religiosity outside prison, any religion-based difference in treatment carries far greater weight in prison. Religious claims give inmates a way to gain privileges, and for inmates—who have few possessions and little control over their lives—such privileges are highly valued. Given that reality, it is not surprising that the then Chaplaincy Administrator of the Federal Bureau of Prisons has testified that religious privileges lead to a "proliferation of [such] requests" among inmates. See *Udey v. Kastner*, 644 F. Supp. 1441, 1447 (E.D. Tex. 1986); see also *Card v. Dugger*, 709 F. Supp. 1098, 1106 (M.D. Fla. 1988) ("if plaintiff is afforded these [religious] privileges, the prison can expect to encounter these requests from inmates of various faiths").

RLUIPA's dramatic enhancement of religious inmates' rights catalyzes that behavior. People can differ over the Sixth Circuit's legal analysis, but few would dispute its common sense observation that "[w]hen inmates see that the rules do not apply with the same force to the religious . . . non-religious prisoners will know what they have to do so that they, too, can benefit from the softer rules: become religious." Pet. App. A7 (quoting *al Ghashiyah v. Dep't of Corrs.*, 250 F. Supp. 2d 1016, 1029 (E.D. Wis. 2003)). Indeed, under RFRA's identical provisions, "the number of inmate requests for accommodations of specific religious practices increased dramatically," J.A. 201, and "inmate claims of conversion . . . proliferated," *id.* at 212 n.2; see also *id.* at 200, 204–05.

This encouragement of religion is far more pronounced than in any other case the Court has considered. The closest

case is *Lee*, which held that even "subtle and indirect" pressures towards religiosity, occurring just once yearly (at a graduation ceremony), were invalid. 505 U.S. at 593, 595. RLUIPA, applied in prisons, creates strong pressure for religion by offering desirable, and otherwise unavailable, benefits. That pressure continues every day, not just once a year—so it is both stronger and more constant than the "subtle pressure" the Court found unconstitutional in *Lee*.

c. RLUIPA's application in prison burdens third parties.

RLUIPA also violates the Establishment Clause by imposing burdens on third parties. The concern over third-party burdens is rooted in both founding history and modern precedent. The Clause originated in opposition to taxes levied, even on non-adherents, to support religious institutions, and the Framers sought to avoid the imposition of such "peculiar burdens" in the future. Remonstrance, *supra*, ¶ 4; *Everson v. Bd. of Educ.*, 330 U.S. 1, 10–13 (1947).

The Court's decisions reflect that concern by including third-party burdens as an important, and even dispositive, Establishment Clause factor. *Caldor*, for example, invalidated a law requiring employers to adjust work schedules to accommodate some workers' religious practices, because it imposed "substantial economic burdens" on employers and "significant burdens on other employees required to work in place of the" accommodated worker. 472 U.S. at 709–10. A plurality in *Texas Monthly* struck a tax exemption given only to religious entities because it "burden[ed] nonbeneficiaries," thereby "conve[ying] a message of endorsement" to slighted members of the community. 489 U.S. at 15 (quotation marks omitted).

The common thread, from the Remonstrance through *Texas Monthly*, is that government may not burden third parties to facilitate someone else's religious activities. Yet

the RFRA/RLUIPA standard, as applied in the prison environment, does so in several ways.

First, it degrades security by forcing States to abandon measures that are reasonably related to preserving that security. For example, it interferes with prison officials' abilities to prevent the use of religious items as non-verbal gang identifiers, see *Alameen v. Coughlin*, 892 F. Supp. 440, 444–47 (E.D.N.Y. 1995) (contrasting RFRA and pre-RFRA standards), and to prevent inmates from growing long hair to hide contraband. Compare *Hoevenaar v. Lazaroff*, 276 F. Supp. 2d 811, 816–24 (S.D. Ohio 2003), rev'd on other grounds 108 Fed. Appx. 250 (6th Cir. 2004), with *Pollock v. Marshall*, 845 F.2d 656, 659–60 (6th Cir. 1988). That burdens others by diminishing the safety of all who live and work behind bars.

RLUIPA's strict scrutiny test also undermines security by undercutting the ability of those "on the spot and with the responsibility for the safety of inmates and staff," *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974), to know what is allowed and what is not. Officials find it nearly impossible to predict whether denying an inmate's request will survive RLUIPA's scrutiny, for even if they are confident that safety interests are compelling, they are never sure whether a court looking in hindsight will discover a less-restrictive means to protect that interest. Indeed, even courts, with the advantage of hindsight, do not agree on what this standard requires. Compare, e.g., *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995), with *Estep v. Dent*, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996) (contradictory decisions about the validity of the same grooming regulation under RFRA). That is precisely why the Court rejected the least restrictive means test in *Turner*, 482 U.S. at 89.

Second, RLUIPA imposes significant administrative burdens. The upsurge in religious demands triggered by RFRA's identical standard undisputedly caused "significant

burdens on [] already overburdened corrections staffs." J.A. 212. And RLUIPA's "least restrictive means test" requires staff, in responding to those demands, to "'set up and shoot down' all possible alternatives," *id.* at 204, which is "tremendously time consuming," *id.* at 205. That, in turn, makes those employees unavailable for other pressing tasks. *Id.*

Third, RLUIPA has the ironic effect of limiting the quantity and quality of religious services. Delivery of such services is inherently time-intensive and, before RFRA/RLUIPA, it took up almost all of a chaplain's time. *Id.* at 200–01. RLUIPA's increased administrative demands diminish the time chaplains have to deliver these core services. *Id.* at 201–02, 212. And the increased stridency of inmates' demands, along with the large number of attempted abuses and chaplains' obligations to vet each demand, converge to degrade relationships with inmates. *Id.* at 206.

Those burdens far surpass those found fatal in other cases. The burdens in *Caldor* were more limited: nothing indicated that the law at issue was invoked with any frequency, and, although the work-scheduling burdens were no doubt inconvenient to those involved, those burdens did not implicate basic safety. And the extra tax burden imposed on others by the exemption considered in *Texas Monthly* was likely imperceptible.

RLUIPA's burdens exceed those in several ways. They involve basic security, not just inconvenience. It is routinely invoked, causing administrative disruptions that dwarf those considered in *Caldor*. And RLUIPA's burdens have a far larger footprint than those imposed by the obscure measures considered in *Caldor* and in *Texas Monthly*: "In the necessarily closed environment of the correctional institution, few changes . . . have no ramifications on the liberty of others or on the use of the prison's limited resources," almost

all have "significant 'ripple effect[s]' on fellow inmates [and] prison staff." *Turner*, 482 U.S. at 90.[3]

d. RLUIPA causes excessive government entanglement with religion.

Laws also violate the Establishment Clause if they cause excessive government entanglement with religion. *Lemon*, 403 U.S. at 613–15. RLUIPA, in the unique context of prison, does.

The entanglement RLUIPA causes is particularly problematic. Officials cannot contest whether an inmate's practices are central to his religious beliefs, but they can challenge whether the belief system is really a religion, and whether or not the inmate's beliefs are sincere. *Smith*, 494 U.S. at 906–07 (O'Connor, J., concurring). Given the frequency and potentially serious consequences of inmates' use of religion as a cover for other activities, state officials must conduct that inquiry carefully. For example, security concerns require a thorough vetting of outside providers and the doctrines those providers espouse, as well as close monitoring of religious activities conducted within prison. Office of the Inspector General, A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Services Providers, 50–51, 53–54 (2004). Indeed, the record here shows that officials must review large volumes of religious publications sent to prisoners. J.A. 267–73, 277. That is the type of "comprehensive, discriminating, and continuing state surveillance," *Lemon*, 403 U.S. at 619, that constitutes excessive entanglement.

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[3] Further, Petitioners misread *Texas Monthly* by arguing that it allows secular burdens if they are imposed to lift religious ones. Pet. Br. at 32. The plurality states the test as disjunctive: a hyper-constitutional accommodation is invalid if it "*either* burdens nonbeneficiaries markedly *or*" does not remove religious burdens. 489 U.S. at 15 (emphasis added). Petitioners do not dispute the burdens on others, which invalidate RLUIPA regardless of its burden-lifting goal.

Ohio recognizes that the prison environment makes some level of entanglement inevitable. Prison officials, by necessity, pervasively monitor inmates' activities. And, of course, the Free Exercise Clause mandates that prisoners may engage in some forms of religious practice. See *Cruz v. Beto*, 405 U.S. 319, 321–23 (1972). These two realities combine to require some State entanglement in religion. Indeed, Ohio concedes that Free Exercise Clause requirements may allow a level of entanglement in prison that would violate the Establishment Clause outside of prison. But it is undisputed that RLUIPA goes well beyond what the Free Exercise Clause requires, so Petitioners cannot rely on the State's need to allow Free Exercise to justify the entanglement here.

* * *

We acknowledge that a law can remain valid even with some of the above indicia. *Amos* upheld a law that was not religiously neutral; *Everson* allowed a subsidy that may have motivated some families to send their children to religious schools; and *Agostini* sustained a program involving some State supervision of its religious beneficiaries. But none of those individual features were present with the enhanced intensity that the prison environment produces, and none of those cases involved the unprecedented confluence of invalidating factors found in RLUIPA. Whether discussed in terms of "effects" or "endorsement," RLUIPA's implications are clear: religious inmates, *because of their religion*, have far greater rights than others. That violates the Constitution.

e. RLUIPA is not a permissible accommodation under *Amos*.

Petitioners rely heavily on *Amos* to argue that RLUIPA is a valid accommodation. Their arguments misunderstand both *Amos*'s rule and how RLUIPA operates.

1. Initially, and notably, the Court has not said—in *Amos* or in any other case—that accommodation measures generally are insulated from Establishment Clause scrutiny.

Indeed, *Amos* expressly recognized that at "some point, accommodation may devolve into an unlawful fostering of religion," 483 U.S. at 334–35, a principle ratified in other cases. See *Lee*, 505 U.S. at 587; *Kiryas Joel*, 512 U.S. at 706. And the Court has, in *Texas Monthly*, *Caldor* and *Kiryas Joel*, struck laws offering religious exemptions or accommodations.

2. RLUIPA goes much further than the accommodation at issue in *Amos*. There, Congress had enacted a law "exempt[ing] religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion." 483 U.S. at 329. An employee fired for religious reasons challenged the law on Establishment Clause grounds.

The Court rejected his claim. It held that "[f]or a law to have forbidden 'effects' . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337 (emphasis in original). That required a showing of "active involvement of the sovereign in religious activity," something different from simply allowing churches to advance religion on their own. *Id.* The Court then explained that two related features of the law showed why that had not occurred.

First, the law did not affect churches' original pre-regulation rights. It did not give them greater rights than they had before Congress first entered the field; it simply left them where they were before Title VII. "In such circumstances, we do not see how any advancement of religion . . . can be fairly attributed to the Government, as opposed to the Church." *Id.*

Second, the law did not require anybody to take any action on account of religion, but left churches and their employees to their own devices: "In the present cases, [the employee] was not legally obligated to take [any] steps . . . and his discharge was not required by statute." *Id.* at n.15. The Court contrasted that to the law considered in *Caldor*,

which required employers to take affirmative steps to accommodate religious employees, and found that to be "very different." *Id.*

Indeed, most religious-accommodation laws follow the *Amos* model, i.e., a sovereign exempts religious objectors from some burden that it has imposed, thus leaving those citizens in the same position that they would be in if the sovereign had never entered the field. For example, as Petitioners note, Ohio exempts ordained ministers from State laws barring the unlicensed practice of psychology. Pet. Br. at 18. But that exemption leaves a minister in the same place that she would occupy if Ohio did not regulate psychology at all; she receives no net benefit. Further, her exemption does not burden anyone else. Ohio has no quarrel with this law, or any of the other "widely-accepted accommodations of religion" that Petitioners cite that follow this model. *Id.* at 17.[4]

But RLUIPA is different. Unlike such permissible burden-lifting laws, RLUIPA does not lift burdens that the same sovereign imposed. Rather, the federal government compels others, sovereign States, to take affirmative steps—to alter their otherwise lawful conduct—in order to accommodate religious practices. It is one thing to step aside to let someone pass (as exemption statutes do), it is quite another to push a third party out of the way (as RLUIPA does). And, in providing religious prisoners this benefit, Congress gives them far greater rights than they had before Congress entered the field.

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[4] Petitioners cite two other laws that, in their view, are threatened by Ohio's position, but both would easily survive. Connecticut may, in our view, continue to exempt religious rituals from animal slaughter laws, because those performing the rituals are no better off than if the State simply did not regulate animal slaughter. Likewise, Delaware may continue to exempt prayer-based treatment from medical-treatment laws, as again, the citizens who are accommodated are merely left alone.

3. The U.S. seeks to ignore the critical difference between prison life and normal civil society when it says that RLUIPA does not result in "government advancing religion," but "simply affords individuals the opportunity to exercise and advance their religious faith *on their own*." U.S. Br. at 18 (emphasis added). Outside prison walls, many religious accommodations may involve nothing more than the government "getting out of the way," so that citizens act "on their own." But prisoners do virtually nothing "on their own." Wardens oversee every aspect of their lives, including their religious exercises. Prison officials provide the rooms when inmates meet for religious purposes—as Petitioners demand here, J.A. 42—and provide a guard to supervise such meetings. Prison officials provide paid chaplains and pay extra for meals meeting religious dietary requirements. To be sure, the Free Exercise Clause may require prison officials to provide some of these things, but in providing any of them, the government is inherently active, not passive. So to the extent that such provision goes beyond constitutional minimums, the State is indeed advancing religion. And in forcing the States to do so, the federal government is also advancing religion. Viewed at either level, then, RLUIPA is "government itself" advancing religion. See *Amos*, 483 U.S. at 337 (quotation marks and emphasis omitted).

4. Other *Amos*-type exemptions also present very different Establishment Clause concerns because they arise outside of prison. Exemptions and accommodations outside prison will generally present little, if any, danger of communicating endorsement, as very few people notice when government grants such exemptions. Further, and perhaps more important, even fewer people are actually affected by those exemptions; they have very little impact on anyone besides those exempted.

Prison could not be more different. As discussed above, no official action goes unnoticed there, and almost all actions directly effect other inmates and staff. "[I]ncreased freedom

for [religious prisoners] come[s] 'only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike.'" *In re Long Term Admin. Segregation of Inmates*, 174 F.3d 464, 470 (4th Cir. 1999) (quoting *Turner*, 482 U.S. at 92–93). While religious exemptions outside prison walls are typically valid, the powerful weapon RLUIPA provides religious inmates inside those walls violates the Establishment Clause.

2. RLUIPA unconstitutionally interferes with State power to act within the "play in the joints" between the Religion Clauses.

Even if RLUIPA did not violate the Establishment Clause's libertarian aspect by advancing religion within prisons, it separately violates another Establishment Clause limitation: the federalist aspect, which reserves to the States the power to act within the "play in the joints" between the two Religion Clauses. See *Locke*, 540 U.S. at 718.

This federalist aspect does not mean that the States (as compared to the federal government) face a different line between permissible acts and an Establishment Clause violation, or a different line between permissible acts and a Free Exercise violation. The State faces the identical restraints that the federal government does, in terms of the relationship between citizen and sovereign; Ohio does not challenge that. See *Wallace v. Jaffree*, 472 U.S. 38, 48–49 (1985). Similarly, the States and the federal government both have power—when acting as sovereigns directly regulating citizens—to act in the zone between the clauses.

But when a State exercises its *Locke* power, and selects a point between the clauses, Congress has no power to override that choice and tell the State to pick a different point in that zone. That is, a State may choose to have a school voucher plan that allows students to select either religious schools or secular schools, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), or it may choose to exclude theology majors

from an educational grant program, *Locke*, *supra*. But Congress cannot, simply by legislative fiat, reverse the results in *Zelman* or *Locke*, whether by telling Ohio to exclude religious schools from its voucher plan, or by telling Washington to include theology majors in its program. Independent of whether Congress has any power to do so under any enumerated power (discussed below at 34–46), the Establishment Clause's federalist aspect blocks Congress from imposing its choices on States regarding how to accommodate religion. That dooms RLUIPA.

a. The Court has routinely recognized that in defining the scope of constitutional guarantees, the starting point is the text, along with the original understanding of the drafters as revealed through historical evidence. See *Alden v. Maine*, 527 U.S. 706, 713–27 (1999); *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1360 (2004); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995) (looking to "the available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution").

Here, the text is plain: "Congress shall make no law *respecting* an establishment of religion." That meant, pre-incorporation, not only that Congress could not declare a national religion, but that Congress could not *interfere with* (i.e., make a law *respecting*) State choices to establish official religions. Of course, States can no longer establish preferred churches, but Congress is as unable as ever to contravene constitutionally permissible State choices regarding religious policy.

History confirms this textual meaning. Even a cursory review of the historical record reflects a broadly shared understanding at the founding that the newly-created federal government lacked any authority to regulate the States' treatment of religion. Madison himself stated that: "There is not a shadow of a right in the general government to intermeddle with religion. Its least interference with

[religion] would be a most flagrant usurpation." See 3 Debates on the Adoption of the Federal Constitution 330 (J. Elliot 2d ed., Ayer Co. 1987) (1888) ("Debates"). Others in the constitutional debates echoed those sentiments. For example, in the North Carolina debates, James Iredell asserted that Congress had no power over religion, and that it would be "a just cause of alarm" if it did. 4 Debates at 194; see generally J. Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 Mich. L. Rev. 2347, 2351–57 (1997); W. Hurd & W. Thro, *The Federalism Aspect of the Establishment Clause*, 5 Engage 62–63 (2004).

Commentators confirm this understanding. As Justice Story explained, "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions."[5] J. Story, Commentaries on the Constitution 702 (Carolina Academic Press 1987) (1833). Or, as one historian put it: "Americans in 1789 largely believed that issues of Church and State had been satisfactorily settled by the individual states. They agreed that the federal government had no power in such matters." T. Curry, The First Freedoms 194 (1986). Another historian put it this way: "[A] widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion .... [R]eligion as a subject of legislation was reserved exclusively to the states." L. Levy, The Establishment Clause 93 (2d ed. 1994). See also Br. of Virginia, et al. at 6–15.

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[5]Of course, that may be a mild overstatement in the sense that there were some "distinctively federal domains"—such as the regulation of territories, the armed forces, and its own legislative sessions—where Congress could constitutionally make laws regarding religion. See Rubenfeld, *supra*, at 2357. But in these areas, Congress was regulating citizens directly, not regulating the State sovereign's treatment of religion.

In addition to finding support in the historical record, the federalist aspect of the Establishment Clause is reflected in the basic constitutional framework and the system of dual sovereignty that it enacts. "Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Alden*, 527 U.S. at 713 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996)). These State sovereigns, when acting within their "respective sphere[s]"—such as in matters of religion—are not subject to federal oversight. And, to protect this sovereignty, "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). In short, Congress and the States are both free to directly regulate religion within the "play in the joints," (i.e., both remain subject to the libertarian aspect of the Establishment Clause as well as the Free Exercise Clause), but Congress cannot use its Article I powers to tell the States what choices they must make in that range.

RLUIPA simply ignores this vital constitutional limitation. Through RLUIPA, the federal government orders the States to accede to inmates' religious demands unless prison officials can first show a compelling state interest supporting denial, and also show that denial of the request is the least restrictive means to achieve that interest. One could scarcely imagine a more direct federal intrusion on State decisionmaking about religion.

b. Petitioners and their supporters, unable to meaningfully dispute this historical meaning, instead attempt to sidestep it. Together, they present essentially four arguments. All are flawed.

1. Contrary to Petitioners' suggestion, Ohio does not argue for "two different Establishment Clauses with varying

levels of potency." See U.S. Br. at 26; Pet. Br. at 33–35. Nor does Ohio seek "junior-varsity disincorporation." See U.S. Br. at 32, 31–36. In fact, we concede that Ohio and the federal government face identical limits, under the Religion Clauses, on what we may do as sovereigns regulating our citizens. Ohio insists only that in the permissible zone—where the States may make policy choices without violating either Clause—*the States*, not Congress, get to choose. It is that separate, federalist limit on Congress, not "varying levels of potency," that Ohio relies on here.

2. Nor can the U.S. successfully argue that Congress is not interfering with the States' authority within the "play in the joints," but is merely purchasing the States' acquiescence through its spending power. See *id.* at 28–30. That argument simply ignores that RLUIPA also purports to rest on Commerce Clause grounds, and thus would apply, if constitutional, whether States accept the federal money or not. And as described below, RLUIPA is not a valid exercise of the spending power.

3. The U.S.'s assertion that "everything changed with the Fourteenth Amendment," U.S. Br. at 32, and its insistence that RLUIPA is justified by "Congress's power to protect and enforce the free exercise of religion against State intrusion," *id.* at 34, cannot be squared with *Boerne*. But importantly, in advancing these arguments, the U.S. admits that the federalist aspect of the Clause was "no doubt [] part of the Establishment Clause's genesis." *Id.* at 31. In other words, they admit that we are right about the Clause's meaning, or at least regarding its meaning from 1791 to 1868. Thus, the parties agree, in effect, that the question presented here has been converted from an Establishment Clause question to a Fourteenth Amendment question: did the latter Amendment give the federal government a previously-unavailable power to govern the States' policy choices in the permissible zone between the Religion Clauses? The answer to that question is plainly no.

In particular, this argument entirely sidesteps two fundamental facts about *Boerne* and RLUIPA: (1) the U.S. *lost* in *Boerne*, because RFRA was *not* valid Section 5 legislation, and (2) RLUIPA, just like RFRA, does not "enforce" Free Exercise rights, but openly grants substantive accommodation rights *beyond* the constitutional minimum. Thus, Congress's power to "enforce" free exercise rights is not at issue here, as RLUIPA does not enforce the Constitution. And any suggestion that RLUIPA is valid "prophylactic legislation," see U.S. Br. at 36, is also wrong, as no one even asserts, let alone demonstrates, that RLUIPA meets *Boerne*'s requirement that such legislation be a proportional and congruent response to a historical pattern of State discrimination. See *City of Boerne*, 521 U.S. at 530–32.

The U.S. never says, of course, that Section 5 directly empowers Congress to pass RLUIPA. Instead, the U.S. seems to say that, in addition to the Section 5 enforcement power, there is a "junior-varsity" Section 5. The latter, they appear to claim, does not provide Congress with positive power to act, but rather clears the field of obstacles—such as the federalist aspect of the Establishment Clause—that would otherwise prevent Congress from using its Article I powers to regulate the States. See U.S. Br. at 36. This lesser aspect of Section 5, however, finds no support in either the text or jurisprudence of the Fourteenth Amendment. Section 5 is textually tied to due process and equal protection rights, not to Article I enumerated powers, such as the Commerce Clause, so it cannot boost Congress's ability to "enforce" those powers. In sum, the Fourteenth Amendment did not grant Congress new power, other than through Section 5's actual enforcement provision, to overcome the federalist aspect of the Establishment Clause.[6]

[6] Notably, in arguing that the Fourteenth Amendment left in place the federalist aspect of the Establishment Clause, Ohio does not say that "the Framers of the Fourteenth Amendment intended to decamp on the subject of religious freedom, putting all their trust in the State governments' discretionary protection and accommodation of religious exercise." U.S. Br. at 35. The Fourteenth Amendment imposed federal control over the States regarding religion in at least three ways: (1) it substantively imposed the libertarian aspect of the Clause, through incorporation, (2) it thus procedurally empowered the federal judiciary to enforce individuals' rights against the States, and (3) it gave Congress enforcement power under Section 5, when Section 5 is truly triggered. Thus, the U.S.'s accusation is yet another attack on a strawman.

4. Amicus National Association of Evangelicals, et al. ("NAE") erects one further strawman. It contends that Ohio broadly argues that Congress can make no law "touching religion." NAE Br. at 28. But that also misstates Ohio's argument. To be sure, as the NAE points out, Congress had power to directly regulate religion during the founding times. But this was true, as the NAE's own examples demonstrate, where Congress was exercising state-like control, acting as a sovereign directly regulating citizens. *Id.* at 29 (citing the Northwest Territory, Indian tribes, and the Louisiana Purchase). NAE provides no examples—nor do any exist, to our knowledge—of instances in which the federal government told the States how to exercise *our* sovereign powers in regulating our citizens within the "play in the joints." Ohio freely admits that Congress can, where its enumerated powers enable it, directly regulate individuals regarding religion (again, within the "play in the joints"), including individuals within the States. But the federalist aspect of the Establishment Clause prevents Congress from intruding on *State* choices regarding the treatment of religion.[7]

[7] NAE's alternative argument—that to the extent that the Establishment Clause polices federal-state boundaries, it merely prevents Congress from interfering with State "establishments"—is also flawed. NAE Br. at 21. The Founders understood the Constitution to prevent *any* federal "intermeddling" in the States' treatment of religion. See above at 25–27. Indeed, the chief concern that New England representatives raised during the discussion of the First Amendment was that it might be interpreted to "give Congress power to interfere with existing [religious] arrangements

Once this distinction is clear, the NAE's parade of horribles disappears. See *id.* at 29. For example, the federalist aspect, as Ohio urges it, leaves Congress free, under *Locke*, to include (or exclude) church-affiliated schools in federal programs to aid education. See *id.* What Congress cannot do through its Article I powers is mandate that States follow the same course with their own programs.

By contrast, while the NAE's parade of horribles does not truly threaten, Petitioners' view would cause devastating effects, as it would allow Congress to impose national religious regulations in a host of areas now left to State and local governments. For example, the Court has repeatedly allowed local governments to recognize the social significance of Christmas by displaying decorations that include secular and religious symbols alike, within certain limits. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Of course, while such displays are permitted, none are required, and in our diverse nation, state and local governments choose varying degrees of Christmas recognition (within Establishment Clause bounds). But if Congress has the power to choose for us, within the permissible zone, then Congress could pass a national ban on Christmas displays on state and local government property, or Congress could *require* every State to display a constitutionally-compliant crèche on State grounds, or, at the very least, Congress could impose that requirement as a condition to receiving federal money.

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in the individual states," as the New England States did not consider their treatment of religion to rise to the level of an establishment. See Curry, above, at 203. It was this concern that prompted Madison to insist that "the least interference" by the federal government would be a "flagrant usurpation" of State prerogative. 3 Debates at 330. NAE thus seeks a reading of the Establishment Clause that rejects Madison, and visits upon the States the very intermeddling that the New England representatives feared.

Similarly, Congress could impose all sorts of religious accommodations, crushing the religious diversity among the States and imposing a procrustean plan on the Nation. The States have always served as "laboratories of democracy," and nowhere is that more true than within the "play in the joints" between the Religion Clauses. States provide differing degrees of protection, and they do so in different specific areas. Some have enacted "state RFRAs," directing their state courts to generally protect religion.[8] Others have enacted religious exemptions to specific laws, such as vaccination requirements, Ohio Rev. Code § 3313.671(A)(3), alcohol regulations exempting sacramental wines, *id.* §§ 4301.631(F), 4301.69(A), 4307.05(B), and rules about animal slaughter, Conn. Gen. Stat. § 22-272a(e), among many others.

But under Petitioners' view, Congress could simply order all the States to allow exemptions from vaccination or other laws, or could mandate a national accommodation scheme in any way it wishes, within the *Locke* permissible zone. Surely that is not what the law allows, and surely that would not be good for federalism or for religious diversity. Yet that is the unavoidable result of adopting Petitioners' evisceration of the federalist aspect of the Establishment Clause. The Court should decline to take that step.

B. The Court should reach the enumerated powers issues.

In addition to violating the Establishment Clause, RLUIPA also exceeds the scope of Congress's enumerated powers. RLUIPA's attempt to regulate state regulation does not fall within either the spending or the commerce powers, the two bases on which Congress relies. And, despite

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[8] See, e.g., Okla. Stat. tit. 51, § 253; Idaho Code § 73-402; Fla. Stat. § 761.03.

Petitioners' suggestion to the contrary, it is not only appropriate, but vital, for the Court to address these issues. See Pet. Br. at 35–36.

It is appropriate, as the Court has long recognized its ability to affirm judgments of lower courts on alternate grounds. *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). This is especially true where, as here, the alternate grounds are principally legal issues—for which no further factual development is necessary—that were fully briefed and presented below. Indeed, not only did the parties present the enumerated powers argument, but the district court expressly ruled on the spending issue in its decision below. Pet. App. B8–B13. Nor is remand required to decide if the statutory effect-on-commerce jurisdictional hook is met here, as in our view, Congress lacked commerce power even if that element is satisfied. Thus, the Court should consider the enumerated powers arguments as well.

And it is vital that the Court do so. As our acquiescence noted, declining to address these arguments could lead to the anomalous result that the Court could uphold RLUIPA even if a majority of Justices would find it unconstitutional, albeit on varying grounds. See Ohio Br. in Resp. to Cert. Pet. at 16–17. Further, failing to reach the issues would impose years of uncertainty and litigation on the States.

Finally, the Court should reach *both* the commerce and spending issues, regardless of its answer on either. If the Court upholds RLUIPA on spending grounds, but leaves the commerce question open, States will not know if refusing federal prison funds will actually free them of RLUIPA's demands. Conversely, if the Court upholds it on commerce grounds, but does not address spending, States will not know if RLUIPA would apply in cases involving no effect on interstate commerce. See 42 U.S.C. § 2000cc-1(b)(1). In fact, RLUIPA does not fall within either of these powers.

C. RLUIPA is not valid Spending Clause legislation.

The spending power fails, for two reasons, to justify RLUIPA's application here. First, where, as here, a federal law seeking to regulate the States falls outside the scope of any other enumerated power, and also opens the States to coercive sanctions, the relatedness requirement is especially significant. RLUIPA fails to meet that requirement, as no nexus exists between RLUIPA's demands and the federal funds to which its conditions attach. Second, the spending power has a contractual nature; Congress buys State acquiescence. But the power to contract has limits. In particular, Congress cannot buy, and a State cannot sell, the State's power to make religious policy within the "play in the joints."

1. Federalism mandates a strong relatedness requirement for State-directed spending power legislation that does not fall within any other enumerated power.

a. The spending power presents special concerns, for, left unchecked, it "could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167. It could transform our constitutional republic from one in which "[e]ach State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States . . . or reserved to themselves," *United States v. Butler*, 297 U.S. 1, 63 (1936), into one in which the federal government's regulatory tendrils weave their way into every possible field of governance, choking off the States' separate sovereignty.

By making that observation, Ohio does not suggest that Congress's spending powers are limited to its enumerated powers. It is now settled that Congress can use its power to tax and spend for the general welfare under Article I, § 8, clause 1, to reach areas it otherwise could not. *Butler*, 297 U.S. at 66; *Dole*, 483 U.S. at 207. In other words, Ohio

concedes that Congress can fund (and impose conditions on) projects that it concludes would further the general welfare, even if those projects are outside of its regulatory authority.

But that power is limited in two ways. First, Congress must identify a legitimate *national* interest underlying its conception of the "general welfare." Second, in pursuing that interest, Congress can only impose conditions that are related to the funding it is providing (i.e., to the national interests it is pursuing through that funding). Congress cannot go further and attach conditions that control matters unrelated to the grant unless, of course, Congress is independently authorized by other enumerated powers to regulate those matters directly.[9] And this relatedness requirement takes on special significance where the "contractual obligation" comes with teeth—opening the State to federal lawsuits by third parties that seek to change the State's regulatory behavior.

The Court's spending power cases reflect these principles. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), for example, involved financial incentives for States to enact unemployment insurance systems meeting federal standards. The Court upheld the conditions at issue based on its findings that (1) the national interest was clear—at the time, the problem of unemployment "had become national in area and dimensions," and Congress was acting "to safeguard its own treasury," *id.* at 586, 591; (2) the conditions Congress imposed were closely related to achieving that federal interest, *id.* at 591; and, (3) the States were not subject to lawsuits for failure to comply, rather, the only sanction would be loss of the federal funds, *id.* at 595. Thus, the legislation did not impermissibly invade State sovereignty, as

[9] If Congress could impose the regulation directly, i.e., without relying on its ability to purchase State acquiescence through its spending power, the relatedness requirement can be relaxed. In such cases, Congress is not expanding the scope of its authority, but rather merely relying on one grant of power (i.e., spending) rather than another (e.g., commerce).

both the condition and the enforcement mechanism did not stray beyond the clear national purpose underlying the financial incentive.

The same was true in *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947). There the condition attached to the funds was closely connected to the national interest in ensuring efficient expenditure of federal grants. In particular, it was meant to eliminate political influence in the administration of federal programs. It did so by prohibiting actively partisan state officials from managing the federal funds. *Id.* at 143. And the relatedness to that national interest was strong, as the condition was directed to "activit[ies] financed in whole or in part by . . . a federal agency." *Id.* at 132. Finally, once again, the condition did not compel the State to do anything, as the only sanction for non-compliance was a reduction in future federal funds. *Id.* at 129 n.1.

The same pattern was also present in *Dole*. The Court there stressed that conditions would be "illegitimate if they [were] unrelated to the federal interest in *particular* national projects or programs." 483 U.S. at 209 (emphasis added; quotation marks omitted). The Court found that the condition at issue there could be constitutionally enforced because it addressed particular state action that directly impeded the functioning of an existing federal program—alcohol laws that led to drunk driving on highways Congress subsidized specifically to increase safety. See 23 U.S.C. § 101(b) (declaring a federal policy "to increase the safety of [federally funded highway] systems to the maximum extent"). The Court therefore had no difficulty concluding that the conditions addressed a "*particular* impediment to a purpose for which the funds are expended." *Dole*, 482 U.S. at 209 (emphasis added). Further, the condition did not provide any sanction beyond a reduction of future federal funds; the State could not be forced to do anything. *Id.* at 211.

b. Allowing RLUIPA to stand based on the federal funding here would be a large step beyond what the Court has previously approved.

First, no legitimate national interest exists in removing burdens on religious exercise that States may impose in prisons. As noted above, the Constitution expressly allocates to the States the right to control their own religious policy choices within the permissible constitutional range between Free Exercise and Establishment. Congress's attempt to nationalize the standard thus not only fails to serve any legitimate national interest, but actually violates the Constitution of its own accord. See above at 25–29.

Second, the funding to which the condition attaches is wholly unrelated to RLUIPA's subject matter. Petitioners have never claimed, nor could they, that the religious burdens they allege interfere with any federally funded programs in prison, or with Petitioners' ability to benefit from those programs. Hence we are not dealing with a "particular," or indeed any, "impediment to a purpose for which the funds are expended" within *Dole*'s meaning. Moreover, no one claims that those religious burdens are imposed by Ohio's operation of these federal programs, so Petitioners cannot claim that federal dollars are being used to subsidize state conduct Congress has no wish to support. Cf. *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974).

In short, the federal funding here is completely disconnected from the matters at issue; this is a case about Ohio's use of its *own*, non-federally generated, resources. Applying RLUIPA here thus cannot be justified as an effort to ensure that federal funds are used for their intended purposes, but that is the only legitimate function of Spending Clause legislation under our constitutional system.

Third, the way in which RLUIPA's conditions are enforced is also problematic. The Court has never enforced, over a State's objection that the law attempted to regulate

beyond Congress's enumerated powers, Spending Clause legislation that provided for anything more than the termination of the federal incentive when a violation occurs. Further, it has supported its decisions sustaining those measures by specifically referencing that aspect of the conditions. *Steward Mach. Co.*, 301 U.S. at 595; *Oklahoma*, 330 U.S. at 143.

By contrast, RLUIPA is not enforced by the withdrawal of federal funds. Far from simply turning off the federal spigot in the face of non-compliance, RLUIPA compels States, by way of a federal court order, to change prison operations. As the Court held in *Butler*, "[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended" and one that forces compliance with "a regulation which otherwise could not be enforced." 297 U.S. at 73.

Moreover, such regulation would intrude into a core function that is undoubtedly one of state, rather than federal, concern. That is not only true of religious policy choices, but also of state prison management. "The right to formulate and enforce penal sanctions is an important aspect for the sovereignty retained by the State," *Kelly v. Robinson*, 479 U.S. 36, 47 (1986), and the management of "penal institutions is an essential part of that task," *Procunier v. Martinez*, 416 U.S. 396, 412 (1974). Indeed, "[i]t is difficult to imagine an activity in which a state has a stronger interest." *Preiser*, 411 U.S. at 491–92.

* * *

In sum, Congress can reach these matters via its Spending Power only if the religious burdens at issue actually affect the operation of particular federal programs. They do not, as evidenced by the indisputable (and undisputed) facts that (1) the relief requested would not in any way change the manner in which those grants are administered and (2) that relief would constrict Ohio's

constitutionally recognized discretion to use its *own* resources in otherwise lawful ways. RLUIPA therefore cannot be constitutionally applied to this case.

2. Congress lacks authority to purchase State compliance on religious policy decisions within the "play in the joints."

Petitioners' reliance on Congress's spending power fails for another reason as well. Congress lacks authority to buy the State compliance that is at issue here.

The spending power is a form of contractual exchange: the federal government "buys" from the State, and the State "sells" to the federal government, the power to set policy X or Y. But this sale may take place only if Congress is free to buy, and the State is free to sell. Neither is the case here. The power to contract, after all, has limits. Courts do not enforce certain deals, such as those based on duress, Restatement (Second) of Contracts § 175, or those that threaten our political process—for example, vote-buying agreements, see *Exchange Nat'l Bank v. Henderson*, 77 S.E. 36, 39 (Ga. 1913). Similarly, the Court should reject attempted spending power purchases that would undermine our constitutional framework.

While States can sell many aspects of their rule-making authority—their power under the 21st Amendment to set the drinking age for example, see *Dole*—religion is different. The Constitution assigns exclusively to the *States* all religious policy decisions within the States' sovereign sphere. And it does so not merely for the benefit of the States, but also for the benefit of the citizens. The specific danger the Establishment Clause was designed to prevent is the problem of a national orthodoxy. And the structural method the Founders chose to address that danger was to ensure that governmental power over religion, to the extent it exists, would be dispersed among the States. But Congress could easily undo that dispersal, and destroy that structural

safeguard, if it may simply purchase each State's separate sovereignty and therefore create a national uniformity. That would indeed "render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167.

3. Petitioners' arguments are inapposite.

Petitioners, the Government and their amici offer several arguments in support of RLUIPA's validity as Spending Clause legislation, but they are based on misconceptions about our analysis.

First, the arguments that a general overlap between religious exercise and some program's rehabilitative goals is sufficient to sustain RLUIPA overlooks the nature of the challenge. Pet. Br. at 40; U.S. Br. at 43; Sens. Hatch & Kennedy Br. at 10–11. Respondents agree that such an overlap would defeat a facial challenge, but Ohio is not making such a challenge. Instead, our relatedness argument has always been that the religious burdens alleged are not sufficiently related to the funding Ohio actually receives from the federal government. Hence, these arguments address a claim not made here.

The same is true of our opponents' reliance on *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941 (2004), a case that is distinguishable in two ways. First, it did not involve the most crucial aspect of this case—Congress's power to regulate States—but instead dealt with private conduct. Indeed, it expressly distinguished the law considered there from other laws by which Congress tries to influence "a State's own choices of public policy." *Id.* at 1948. Further, the law there was directly related to ensuring that federal funds are spent as Congress intends; it policed federal grants by ensuring their recipients' fiscal integrity. As noted above, RLUIPA's application here is not connected to any federal program.

RLUIPA's supporters are also mistaken on several levels in suggesting that success on this challenge will invalidate other federal laws. Initially, that argument overstates the import of this challenge to this particular application of this particular law. At most, success on our claim would mean that a party would need to show a functional nexus to a particular federal program when using a Spending Clause law to constrict a *State's* discretion in an area otherwise beyond Congress's reach. That holding would not affect claims against private grant recipients. Further, most of the laws Petitioners cite are within Congress's reach under other constitutional provisions, so success for Ohio here would not imperil those laws. Section 5 of the Fourteenth Amendment justifies the Equal Access Act, 20 U.S.C. §§ 4071 et seq., and Title VI, 42 U.S.C. §§ 2000d et seq., as they simply enforce constitutional rights. And the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq., and Title IX, 20 U.S.C. §§ 1681 et seq., fit well within the Commerce Power. Thus, the holding we seek here would not affect those laws at all.

In short, notwithstanding Petitioners' arguments, the spending power has limits. RLUIPA, especially in light of the federal funding here, far surpasses them.

D. RLUIPA is not valid Commerce Clause legislation.

Nor can RLUIPA rest on Congress's commerce power. While that power is broad, Congress cannot use it to regulate patently noneconomic activities. Yet that is precisely what Congress seeks to do here.

1. Congress's commerce power is limited to three general categories: (1) regulating the "channels of interstate commerce," (2) regulating and protecting "the instrumentalities of interstate commerce," and (3) regulating activities that "hav[e] a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549,

558 (1995) (citations omitted). Of course, RLUIPA, as applied in state prisons, does not seek to regulate either the channels or instrumentalities of commerce. Thus, RLUIPA, like the laws at issue in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), stands or falls on the "substantial relation" or "substantial effects" test.

But *Lopez* and *Morrison* impose an insuperable obstacle to finding that RLUIPA meets the "substantial effects" criterion. In particular, both cases confirm that Congress can regulate only "*economic activity* that substantially affects interstate commerce." *Lopez*, 514 U.S. at 560 (emphasis added); *Morrison*, 529 U.S. at 610–11. That is, Congress may not regulate non-economic activity, even if that non-economic activity has a substantial effect on interstate commerce. Thus, the Gun-Free School Zones Act was invalidated because gun possession is not "'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. It did not matter that gun possession might impact interstate commerce: the activity itself was not economic, and that was dispositive. *Id.* at 567–68. Similarly, Congress had no power to enact the civil remedy provision of the Violence Against Women Act, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity," even though such crimes may substantially impact interstate commerce. *Morrison*, 529 U.S. at 613.

Policing this economic/non-economic distinction is vital to preserving the Commerce Clause's federalist protections. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring)). Indeed, the boundaries would disappear altogether. After all, school curriculum, as the Court noted in *Lopez*, could

significantly affect learning, which could in turn have a "substantial effect on interstate commerce." 514 U.S. at 565. But, by limiting Congress's reach to "economic activities," the Court preserves State control over this and other traditional areas of state concern.

The "economic endeavors" limitation dooms RLUIPA. The Act regulates State regulation of prisoners' religious practices. But neither prison governance generally, nor prison decisions imposing burdens on prisoners' religious exercise in particular, nor the inmates' religious practices themselves qualify as a commercial or economic endeavor.[10] To be sure, these activities may impact commerce—just like gun possession in *Lopez*, or crimes against women in *Morrison*—but that effect is not enough. And, while prison operations, as opposed to prison governance, certainly include a variety of commercial elements—for example, purchasing food and clothing for prisoners—RLUIPA's text is not directed to any of them. Rather, its exclusive focus is on removing religious burdens.

Nor does RLUIPA's inclusion of a commerce-based jurisdictional limit cure this constitutional problem. Ohio recognizes that RLUIPA's commerce-based application extends only to those religious burdens that "lead in the aggregate to a substantial effect on commerce," 42 U.S.C. 2000cc-2(g), but that misses the point. Because the regulated activities are not "economic endeavors," their aggregate effect is simply irrelevant.[11] And the Hobbs Act jurisdictional

[10] By contrast, a prison does engage in economic endeavors when it purchases goods or services or hires employees. But prison governance of inmates is different.

[11] The jurisdictional provision also fails for another reason. Because a valid commerce connection is a constitutional threshold, courts cannot presume that commerce effects exist. But RLUIPA mandates that presumption. It places the burden on the defendant/State to show that the alleged religious burdens do not, in the aggregate, have a substantial effect on interstate commerce. 42 U.S.C. § 2000cc-2(g).

provision on which Petitioners rely is simply inapposite. To be sure, the Hobbs Act, 18 U.S.C. § 1951, limits its jurisdiction to conduct that "in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce." But the Hobbs Act is directed against property crimes, which necessarily involve depriving someone of an economic asset (e.g., money, property, etc.). In that sense, those crimes are economic activities, and the question of their impact on intrastate commerce is thus constitutionally relevant.

Moreover, RLUIPA may not be predicated on broad notions of resuscitating state prisoners' ability to engage in commerce generally. Congress has the power to protect the general Commerce Clause "right to engage in interstate commerce free of restrictive state regulation." *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (quotation marks omitted). But that power cannot extend to restoring to prisoners the liberty to engage in commerce, once the State has constitutionally diminished that liberty by convicting and sentencing offenders. To accord Congress such power would wholly distort the balance between the State and federal sovereigns. Indeed, the same logic that would bless RLUIPA on those grounds would also permit a law in which Congress, seeking to offset the impact that jailing people has on commerce, mandates that inmates be released for shopping trips at specified intervals. That is not the law, nor should it be.

2. The Necessary and Proper Clause does not bolster Petitioners' Commerce Clause argument. See Art. I, § 8, cl. 18. As the Court has noted, "[w]hen a [l]aw for carrying into [e]xecution the Commerce Clause violates the principle of state sovereignty reflected in [] various constitutional provisions . . . it is not a [l]aw *proper* for carrying into [e]xecution the Commerce Clause, and is thus . . . merely [an] act of usurpation which deserves to be

treated as such." *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (internal citations and quotation marks omitted; emphasis in original).

RLUIPA is just such a usurpation. It attempts to deprive the State of its sovereign right, following "a valid conviction," to "constitutionally depriv[e] [a prisoner] of his liberty" and "confine him and subject him to the rules of its prison system." *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

E. The Tenth Amendment bars RLUIPA as Commerce Clause legislation.

The Tenth Amendment independently bars Congress's ability to use the commerce power to justify RLUIPA. As the Court has observed in language directly on point here:

> Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts .... The Commerce Clause, for example, authorizes Congress to regulate state governments' regulation of interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Printz, 521 U.S. at 924 (quoting *New York*, 505 U.S. at 166). Through RLUIPA, Congress travels this forbidden path.

1. The prohibition on federal attempts to regulate state regulation rests directly on our constitutional framework of dual sovereignty. "[T]he Framers rejected the concept of a central government that would act upon and through the states, and instead designed a system in which the State and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" *Printz*, 521 U.S. at 919–20. Indeed, the pervasive theme running through *New York* was that "Congress generally may not compel state governments

to regulate pursuant to federal direction." 505 U.S. at 177 (emphasis omitted); see also *id.* at 162 ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"). And the prohibition applies even where Congress would otherwise have the power to regulate directly. See *Reno v. Condon*, 528 U.S. 141, 149 (2000) (The statutes in *New York* and *Printz* were invalid "not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.").

RLUIPA as applied in prisons flies directly in the face of this constitutional demand. But the Court need not take our word for it. In floor comments, RLUIPA's two primary sponsors explicitly acknowledge its core purpose—to regulate the States' regulation of their prisons, by overriding what the two Senators viewed as "inadequately formulated [] regulations and policies."[12] In short, Congress expressly sought to regulate the way States regulate their prisons.

Not only does § 3 improperly regulate State regulation, it does so in a way that strikes at the very heart of State sovereignty. Incarcerating people, and determining the terms of that incarceration, is a uniquely sovereign function, and federal attempts "to 'second guess' the decisions of state ... administrators in this sensitive area" are to be avoided. *Jones*, 433 U.S. at 137 (Burger, C.J., concurring). But RLUIPA ensures constant "second guessing," as State prison management decisions will always be "subject to the possibility" of a federal override, making federal courts "the primary arbiters of what constitutes the best solution to every administrative problem." *Turner*, 482 U.S. at 89. In short, RLUIPA seeks to mandate the way in which state officials make their regulatory decisions in this sensitive area.

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[12] 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

2. In doing so, RLUIPA provides a prime example of the structural problem such federal overreaching causes—lack of accountability. By regulating State regulation, Congress distorts the public's perception of who is responsible for policy decisions. Congress places States "in the position of taking the blame" for the shortcomings in Congress's policy choices. *Printz*, 521 U.S. at 930. That will undoubtedly occur here, as Ohio's citizens will properly be outraged that their tax dollars are being used to accommodate "religious expression" in Ohio's prisons that openly advocates violence against minorities. See above at 6.

New York and *Printz* establish that Congress cannot compel States to affirmatively regulate according to congressional policy choices. RLUIPA does that. It is difficult to imagine a more flagrant violation of the Tenth Amendment's federalism mandate.[13]

* * *

RLUIPA purports to be a law expanding individual rights, but it is not. Its ultimate results undercut individual rights, including rights of religious liberty. By forcing third parties to bear the burdens of accommodation—including forcing other inmates to risk their safety—it surely harms those parties' rights. And by offering powerful incentives to claim or feign religion to obtain benefits in prison, it degrades, rather than enhances, the religious liberty of the inmates who feel that pressure.

Equally, or perhaps more, important, RLUIPA threatens religious liberty by expanding the federal government's

[13] The U.S. also addresses the Eleventh Amendment in its brief. See U.S. Br. at 48–49. Ohio agrees with the U.S. that the Court should not reach that issue, as there are antecedent statutory questions regarding the scope of relief RLUIPA authorizes. See *id.* at 49 n.29. Ohio does *not* agree, however, see *id.* at 49, that Ohio has waived its Eleventh Amendment immunity here. Ohio has not made any "clear declaration" of its willingness to waive such immunity. See *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999).

power at the expense of the States. In ratifying the Constitution, the States did not cede their sovereign power over religion to the newly formed federal government. To be sure, incorporation has limited the scope of the States' power in that area, and the Fourteenth Amendment has given Congress power to enforce the Constitution against the States, but neither of these developments gave Congress the power to enact the supra-constitutional accommodation mandate reflected in RLUIPA. Permitting a congressional takeover of the zone between the Religion Clauses thus directly contradicts the constitutional design, and it would stifle the rich diversity of State approaches to religious accommodation.

To be sure, the Court had never struck a congressional statute on this basis. But that is only because Congress has never before—save in its ill-fated attempt in RFRA—attempted such a blatant takeover of religious policy. It is Congress, not Ohio, that seeks an unprecedented rewriting of the Constitution—one that violates text and tradition, and not incidentally would aggrandize Congress's own power at the expense of States and citizens alike. The Court should again tell Congress "No."

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

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No. 03-9877

In the Supreme Court of the United States

JON B. CUTTER, ET AL., PETITIONERS

v.

REGINALD WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

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REGINALD WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, ET AL.

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

Ohio and their amici devote most of their briefing to asking this Court to disinter and adopt long-rejected arguments against full incorporation of the Establishment Clause, governmental power to accommodate religious exercise, and the federal government's ability to ensure that federally funded programs operate in accord with federal policy. Ohio's primary Establishment Clause argument (and the reasoning of the Sixth Circuit) would invalidate many longstanding legislative accommodations of religion, including those previously upheld by the Court, and render Ohio itself virtually powerless to accommodate religious exercise in prison. The States, like the federal government, retain the authority to accommodate religion within the "play in the joints" between what the Establishment Clause forbids and the Free Exercise Clause requires. But there is nothing about that area of operation that makes it uniquely immune from the normal rules of federalism. Once States choose voluntarily to accept federal funding or to engage in interstate commerce, Congress has the constitutional authority to act. And Ohio's contention that the heightened statutory standard of scrutiny prescribed by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, is unworkable in prisons is belied by the fact that Ohio (not to mention the United States government and nearly half of Ohio's state amici) has operated its prison system under that

same legal standard for years, as a matter of state law, without the security-imperiling consequences that Ohio's brief forecasts.[1]

A. RLUIPA Comports With The Establishment Clause

1. RLUIPA Is a Permissible Accommodation of Religion

Far from transgressing Establishment Clause bounds, RLUIPA's legislative accommodation of religious exercise "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). RLUIPA is consistent with the Establishment Clause because it alleviates, in a neutral and even-handed manner, only substantial and unjustified governmentally imposed burdens on religious exercise. Not one of Ohio's amici defends the Sixth Circuit's reasoning that RLUIPA violates the Establishment Clause because it accommodates only religious exercise. That is for good reason. This Court has specifically held that, in accommodating religious exercise, "'there is room for play in the joints' between" what the Free Exercise Clause mandates and the Establishment Clause proscribes, *Locke* v. *Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)), and such accommodations need not "come packaged with benefits to secular entities," *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987). As the States supporting Ohio presumably recognize, the Sixth Circuit's reasoning is not only inconsistent with a wealth of precedent, but also would sound the death knell for legitimate state efforts to accommodate religion and would call the validity of numerous state constitutional provisions and laws into question.

Ohio, for its part, does not dispute that RLUIPA has a permissible secular purpose. See U.S. Br. 10-14; see also

[1] See *Humphrey* v. *Lane*, 728 N.E.2d 1039, 1043 (Ohio) (applying strict scrutiny to prison guard's religious exercise claim); U.S. Br. 25 n.12.

Wallace v. *Jaffree*, 472 U.S. 38, 82-83 (1985) (O'Connor, J., concurring) (when government accommodates religion, purpose inquiry is not relevant). Ohio nevertheless embraces the Sixth Circuit's reasoning and argues (Br. 11-25) that RLUIPA has the primary effect of advancing religion. That argument ignores experience and precedent.

a. RLUIPA accommodates, rather than favors, religion

Ohio objects (Br. 12) that RLUIPA prefers "religion to irreligion," and that it "creates powerful incentives for religiosity" (Br. 15). But that is simply an argument against legislative accommodations of religious exercise, which by definition, accommodate *religious* exercise. Ohio's argument would indict virtually every accommodation of religious exercise ever enacted, from early efforts to exempt religious items from customs duties, see, *e.g.*, ch. 17, 6 Stat. 116 (1813) (plates for printing Bibles), to Prohibition's exemption for sacramental wine, ch. 85, § 3, 41 Stat. 308-309, to the early school release program upheld by this Court in *Zorach*, to Title VII's religious accommodation provision, 42 U.S.C. 2000e-2(a). The argument also defies this Court's invitation for legislative accommodations of religion in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872, 890 (1990):

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Accommodations of religious exercise alone are constitutionally permissible because they reflect a healthy "respect for, but not endorsement of, the fundamental values of others," and a sensitivity to the fact that "general rules can unnecessarily offend the religious conscience when they offend

the conscience of secular society not at all." *Lee* v. *Weisman*, 505 U.S. 577, 628 (1992) (Souter, J., concurring). "What makes accommodation permissible, even praiseworthy, is * * * that the government is accommodating a deeply held belief." *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

Ohio retreats to arguing (Br. 11-12) that government can "prefer 'religion to irreligion' * * * outside," but not within, prison walls because accommodations in prison entail a "dramatic enhancement of religious rights." But Ohio cannot mean what it says. First, that argument would require striking down the constitutions and laws of numerous States, including Ohio, see n.1, *supra*, because they apply the same compelling interest standard of protection for religious exercise—and only religious exercise—in prisons as RLUIPA.

Furthermore, under *Smith*, the enhanced protection of religious, as opposed to non-religious, rights effected by RLUIPA and parallel state laws is no more "dramatic" inside prison walls than outside. *Smith* held, with respect to the operation of neutral laws of general applicability, that the free exercise claims of free citizens merit no greater scrutiny than the claims of prisoners under *Turner* v. *Safley*, 482 U.S. 78 (1987), and *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987). See *Salaam* v. *Lockhart*, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990) (*Smith* "simply brings the free exercise rights of private citizens closer to those of prisoners"), cert. denied, 498 U.S. 1026 (1991). So if the gap between *Smith/Turner* review and RLUIPA's statutory standard renders RLUIPA unconstitutional, then the Court will also have to strike down the constitutions or laws of more than half the States. See U.S. Br. 15 n.6.

Third, Ohio's position renders religious accommodations unconstitutional precisely where they are needed most. The "unique dynamics" of the prison environment enhance,

rather than diminish, government's responsibility and power to accommodate religious exercise. That is why, long before RLUIPA, Ohio (like other States) provided its prisoners with chaplains and imams, but not with publicists or political consultants, accommodated religious dietary needs but not secular food preferences, and permitted prisoners to assemble for worship, but not for political rallies. See U.S. Br. 20 & n.8. True, "prisoners do virtually nothing 'on their own'" (Ohio Br. 24), but that reality heightens the need for accommodation. In prison, as in the military, government burdens that limit or preclude religious exercise are pervasive, and the government does not run afoul of the Establishment Clause by moderating some of those burdens.

Fourth, Ohio contends (Br. 15) that accommodations will fuel resentment and discord among prisoners. But Ohio fails to explain why RLUIPA would inspire that result when the States' parallel and pre-existing protections have not. The The federal Bureau of Prisons' experience is also to the contrary. Indeed, RLUIPA simply serves, in large part, to ensure that those faiths that are "not traditionally recognized by the Ohio Department of Rehabilitation and Corrections," Pet. App. B5, receive the same consideration that more established denominations have long received.

b. RLUIPA balances competing interests

Unlike the absolute protection of Sabbatarians struck down by this Court in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), RLUIPA imposes no inflexible command of accommodation. RLUIPA simply prescribes a well-recognized legal standard for ensuring that substantial, governmentally imposed burdens on religious exercise are warranted and non-discriminatory. At the same time, the RLUIPA standard respects compelling governmental interests in safety and security.

Ohio's contention (Br. 18-20) that RLUIPA unconstitutionally burdens third parties does not withstand scrutiny.

The district court found no factual basis for Ohio's assertion (Br. 18) that RLUIPA degrades prison security. Pet. App. B15. Prison security is a quintessential compelling interest, and Congress made clear that courts should apply RLUIPA's statutory standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with considerations of cost and limited resources." *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7775 (daily ed. July 27, 2000). Even under the Equal Protection Clause, "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" *Johnson* v. *California*, No. 03-636 (Feb. 23, 2005), slip op. 14. RLUIPA's statutory standard "is designed to take relevant differences into account," *id.* at 15, and thus "does not preclude the ability of prison officials to address the compelling interest in prison safety." *Id.* at 14.[2]

Virginia's assertion (Br. 14) that prisoners "have routinely invoked RLUIPA to thwart the States' anti-gang practices" is undercut by the very cases it cites. Virginia refers (*ibid.*) to one of the consolidated cases at hand (*Gerhardt*). But that suit was filed long before RLUIPA was enacted and initially

[2] Experience shows that courts have applied RLUIPA with sensitivity to the unique demands of prison security. See, *e.g.*, *Charles* v. *Verhagen*, 348 F.3d 601, 611 n.4 (7th Cir. 2003) (limiting frequency of prisoner assemblies); *Charles* v. *Frank*, 101 Fed. Appx. 635, 635 (7th Cir. 2004) (upholding prison's interest in combating gangs), cert. denied, 125 S. Ct. 479 (2004); *Borzych* v. *Frank*, No. 04-C-632-C, 2005 WL 318820, at *2 (W.D. Wis. Feb. 8, 2005) (same); see also *Lawson* v. *Singletary*, 85 F.3d 502, 504, 512 (11th Cir. 1996) (per curiam) (rejecting claim to racist religious texts); *Morris* v. *Debruyn*, No. 3:95-CV-227RP, 1996 WL 441860, at *9 (N.D. Ind. 1996). In any event, if the intersection of RLUIPA and prison security gives rise to constitutional concerns, courts should construe RLUIPA's statutory terms to comport with the Constitution's dictates, rather than declare the law facially invalid. *E.g.*, *Harris* v. *United States*, 536 U.S. 545, 555 (2002).

sought relief only under the Ohio Constitution and the First Amendment. It thus is hard to lay the blame for that litigation on RLUIPA.[3]

Ohio also argues (Br. 19) that compliance with RLUIPA is "time consuming." If true, that would be an appropriate reason for Ohio to decline the federal funding that triggered RLUIPA's application in this case. But it does not render RLUIPA an establishment of religion.

Finally, Ohio insists (Br. 19) that RLUIPA has had the effect of limiting the delivery of religious services to inmates. However, that untested factual assertion provides no basis for invalidating RLUIPA facially or as applied on Ohio's motion to dismiss. Indeed, it is not at all clear that what Ohio describes as a reduction in religious services is not, in actuality, simply a more equitable distribution of limited resources across *all* religious faiths, including those "not traditionally recognized by" Ohio, Pet. App. B5.[4]

[3] The other cases cited by Virginia and Ohio demonstrate the need for RLUIPA. See *Marria* v. *Broaddus*, 200 F. Supp. 2d 280, 295 (S.D.N.Y. 2002) (although prison officials refused on security grounds to allow one religious sect access to religious literature, they permitted a different religious group to have the same material); *Alameen* v. *Coughlin*, 892 F. Supp. 440, 442, 450 (E.D.N.Y. 1995) (striking down a complete ban on the possession of Muslim prayer beads, when prison regulations already permitted inmates "to wear only traditionally accepted religious medals, crucifixes, or crosses," and the prison's security objection was based on "unproven assumption[s]" and "pure speculation"); *Hoevenaar* v. *Lazaroff*, 276 F. Supp. 2d 811, 822-823 (S.D. Ohio 2003) (security objections to small patch of hair held to be "clearly illogical," and inconsistent with rules for female inmates and a 1991 prison regulation that allowed the warden to grant the same type of exemption), rev'd on other grounds, 108 Fed. Appx. 250 (6th Cir. 2004), petition for cert. pending, No. 04-534 (filed Oct. 21, 2004).

[4] Ohio's argument (Br. 20-21) that RLUIPA unconstitutionally entails inquiries into whether particular belief systems are "religions" and whether they are sincerely held overlooks that Ohio already has to make those identical assessments under the Ohio Constitution, see *Luken* v. *Briganc*, 797 N.E.2d 1047, 1050-1051 (Ohio Ct. App. 2003).

c. *Amos* confirms RLUIPA's constitutionality

Amos, *supra*, held that legislative accomodations of religion are permissible and need not "come packaged with benefits to secular entities," *id.* at 338. Ohio's efforts (Br. 22-24) to distinguish *Amos* fail.

First, Ohio argues that the exemption of religious organizations from Title VII's prohibition on religious discrimination in hiring simply left the religious claimants "where they were before Title VII" was enacted in 1964 (Br. 22). But the gravamen of Ohio's complaint is that RLUIPA impermissibly favors religion. Yet the Court upheld the accommodation in *Amos* even though it gave Title VII religious entities an exception not awarded to non-religious entities. More broadly, Ohio perceives a distinction between Title VII and RLUIPA only because it fails to consider prison regulations to be burdens on religious exercise that count for purposes of the constitutional analysis. Adjustments of prison regulations to allow religious exercise put prisoners in the same position they would have been but for the interfering prison regulation.

Second, Ohio argues (Br. 23) that *Amos* did not require affirmative action on the part of government officials and that "most religious-accommodation laws follow" that model. But the challenge in *Amos* was to the affirmative action of the government in exempting religious employers (in 1964) and extending that exemption (in 1972) to their non-religious activities. Beyond that, the extent to which an accommodation requires a single affirmative action or ongoing activity is often a function of context, and by itself makes no constitutional difference. Cf. *Agostini* v. *Felton*, 521 U.S. 203, 232-235 (1997) (dispensing with entanglement inquiry). Otherwise, the early release program upheld in *Zorach*, and all accommodations of religion in the military would have to be invalidated. And, whatever the model outside prisons, RLUIPA follows the model of all accommodations of religious exercise inside prisons—such as chaplaincy programs and dietary accommodations—which, due to the realities of prison life, entail ongoing governmental activity.

Third, Ohio argues that RLUIPA involves one government lifting a burden imposed by another. As applied to state prisons accepting federal funds, however, that is factually inaccurate. In all of RLUIPA's applications to State prisons, see U.S. Br. 28-29 & n.16, States agree to lift burdens they themselves have imposed on religious exercise as a condition of receiving federal funds. A State that accepts federal funds and then keeps its promise by lifting unjustified burdens on religious exercise engages in state, not federal, action. More broadly, Ohio never explains why which sovereign lifts the burden should make a difference under the Establishment Clause. If it did, then Title VII's religious accommodation provision would be unconstitutional, compare *TWA, Inc.* v. *Hardison*, 432 U.S. 63 (1977), and this Court must have erred in broadly upholding the Equal Access Act, 20 U.S.C. 4071 *et seq.*, against Establishment Clause challenge. *Board of Educ.* v. *Mergens*, 496 U.S. 226 (1990); *id.* at 260-262 (Kennedy, J., concurring).

2. The Establishment Clause Applies Equally To The Federal And State Governments

a. Ohio's proposed historic distinction is ahistorical

Twenty years ago, the Court recalled just how "firmly embedded in our constitutional jurisprudence" is the principle that the Fourteenth Amendment "impose[s] the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again." *Wallace*, 472 U.S. at 48, 49. Nonetheless, unable to square the Sixth Circuit's Establishment Clause ruling with either this Court's precedent or the Nation's long history of religious accommodation, Ohio and amicus Virginia ask this Court to partition

the Establishment Clause into roughly three "aspects." First, there is the so-called "libertarian" aspect of the Establishment Clause (Ohio Br. 10; Va. Br. 6), which would appear to correspond with the Establishment Clause as it has heretofore been understood, and which would provide individual rights and apply equally to the States and the federal government. Second, there is a heretofore unacknowledged federalism "aspect" of the Clause, which is said to protect States against federal encroachment with respect to either (i) the States' exercise of their "*Locke* power" to "act in the zone between the [Free Exercise and Establishment] clauses" (Ohio Br. 25), or even more ambitiously (ii) any "religious policy choices" made by States (Va. Br. 7). Finally, there is another barely adumbrated aspect of the Clause that is implicated when Congress exercises its Section 5 power (Ohio Br. 30; Va. Br. 13 n.10).

As an initial matter, Establishment Clause law, with its already "blurred, indistinct, and variable" lines, *Lynch* v. *Donnelly*, 465 U.S. 668, 679 (1984), is difficult enough to navigate without overlaying that jurisprudential trifecta. The labyrinthine network of new categories, limitations, and distinctions that Ohio posits would ensnare courts for decades in divining and defining the contours and content of those late-appearing sub-clauses, with no text or history to guide them.[5]

More importantly, Ohio and Virginia can point to no history that supports their argument. They cite statements to the effect that the Establishment Clause initially limited the power of the new federal government, not the States. But those statements, which predate the Fourteenth Amendment and incorporation, avail Ohio and Virginia not at all.

[5] For example, Ohio and Virginia offer no insights on which Establishment Clause will govern which aspects of ongoing joint federal-state programs like those at issue in *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality), and *Agostini* v. *Felton*, 521 U.S. 203 (1997)).

They also muster a few suggestions that the federal government has absolutely no power over religion, even with respect to purely federal matters, but no one embraces that sweeping argument. As to the multipartite rendition of the Establishment Clause that Ohio and Virginia actually embrace, however, they cannot identify anyone anywhere who ever said anything remotely similar to what they ask the Court to constitutionalize here, either at the time the Establishment Clause was enacted or at the time the Fourteenth Amendment was passed.

Ohio and Virginia emphasize that the Establishment Clause, as originally enacted, was designed in part to prevent the federal government from interfering with official state religious establishments. Ohio Br. 26-28; Va. Br. 9-12. That is beside the point. Accommodations of religious exercise are not state establishments of religion and were never treated as such historically, as Ohio itself admits (Br. 31 n.7). More importantly, by the time of the Fourteenth Amendment's enactment, there were no official state establishments left, and neither Ohio nor Virginia provides any historical evidence for arguing that the incorporated Establishment Clause was designed to perpetuate either that by-then anachronistic limitation on federal power or Ohio's multi-tiered sequel to it.

Quite the opposite, by the time the Fourteenth Amendment was enacted, the Establishment Clause was understood to be a guarantor of individual liberty, working in tandem with the Free Exercise Clause. See U.S. Br. 32-34 & n.20. And what history does show is that the Framers of the Fourteenth Amendment were distinctly concerned with the South's historic and enduring oppression and persecution of the religious exercise of slaves, freed slaves, and abolitionists. See U.S. Br. 34-35 & nn. 21-23. Given that record, the *last thing* the Reconstruction Congress would have left to the States is discretion to engage in the selective accommo-

dation of religious exercise—to adopt the "religious policy," for example, of exempting Southern churches from noise laws or zoning regulations but denying such exemptions to abolitionist Methodists or the churches of freed slaves.[6] Thus, with respect to incorporation of the Establishment Clause, Ohio's and Virginia's argument not only lacks any support in the historic record; it affirmatively defies it.

Ohio and Virginia ultimately settle on the position that, in the area between what the Establishment Clause proscribes and the Free Exercise Clause mandates, the States operate free not only from the commands of the Religion Clauses, but also from any regulation by the federal government. That position cannot be reconciled with this Court's decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). In *Boerne*, this Court held that Congress's power under Section 5 of the Fourteenth Amendment to enact prophylactic legislation enforcing the rights protected by Section 1 of the Amendment includes "enforcing the constitutional right to the free exercise of religion." *Id.* at 519. Section 5 thus specifically empowers Congress to "intrude[] into 'legislative spheres of autonomy previously reserved to the States,'" and to "prohibit[] conduct which is not itself unconstitutional." *Id.* at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)). Of course, a central mechanism for enforcing the free exercise of religion prophylactically or remedially would be to require more protection than the Free Exercise Clause itself compels—to step legislatively into that "play in the joints" between the Free Exercise and Establishment Clauses that Ohio and Virginia insist Congress may not enter.

[6] See S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 81 (1865) (noise regulations used to "suppress the religious meetings among the colored people"); *id.* at 85 (regulations authorizing only ordained ministers to preach and imposing a 10 p.m. curfew on meetings to suppress worship services of freed slaves); *id.* at 93 (zoning Negro churches out of town).

Ohio's and Virginia's only answer is to insist (Ohio Br. 30; Va. Br. 13 n.10) that there is some barely adumbrated third "aspect" of the Establishment Clause that allows for Congress's conceded power under the Reconstruction Amendments. But Ohio and Virginia never explain how it is that the Fourteenth Amendment's enforcement clause gave the federal government new power to intrude on the States' regulation of religion, while the substantive provisions of the same Amendment (which is what Congress enforces under Section 5) specifically reserved the States' authority vis-a-vis the federal government.

b. Ohio's federalism argument has already been rejected

While Ohio's vision of constitutional history is novel, its use of federalism principles to circumvent clearly established precedents incorporating the First Amendment is not. Quite the opposite, Ohio's position mirrors the arguments previously made by other States, not one of which succeeded. This Court has quite explicitly "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969) (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964)).[7]

Ohio identifies no sound basis for carving the Establishment Clause out for differential treatment. Ohio's emphasis on the Establishment Clause's original role in delimiting the reach of the federal government and concomitantly enhancing the authority and discretion of the States is no distinction at all. The same was said of the Free Speech Clause. See U.S. Br. 32. Likewise, a half century of this Court's Establishment Clause and First Amendment standing decisions

[7] See Resp. Br. at 7-16, *Malloy* v. *Hogan*, *supra* (No. 1031); *id.* at 16 ("[A]n essential value of federalism is imperilled when State and Federal standards are made from the same mold."); Resp. Br. at 10-16, *Benton* v. *Maryland*, *supra* (No. 201).

confirm that the Establishment Clause is, like other fully incorporated provisions of the Bill of Rights, a "personal right," *Malloy*, 378 U.S. at 10, that promotes individual liberty of conscience, rather than a structural entitlement of the States qua States. See, *e.g.*, *Kiryas Joel*, *supra*, (individual standing to challenge religious accommodation law); *Caldor*, *supra* (same).[8]

B. RLUIPA Is A Valid Exercise Of Congress's Legislative Authority Under The Spending And Commerce Clauses

1. RLUIPA is proper legislation under Congress's spending power

Ohio does not dispute that RLUIPA promotes the general welfare or that its conditions on the use of federal funds are unambiguous. See U.S. Br. 38-41. Ohio's sole distinct challenge to RLUIPA as spending legislation is that its terms do not sufficiently serve a *national* interest. Br. 38-39. That argument is incorrect as a matter of fact and law.

First, Ohio argues (Br. 38) that the funds that it receives are "wholly unrelated to RLUIPA's subject matter." That is wrong. Funds received by Ohio that "deal specifically with inmate rehabilitation," Pet. App. B13, directly implicate RLUIPA's mandate for the even-handed and scrutinized accommodation of inmate religious practices during their rehabilitation. See *id.* at B7. Other funds are for prisoner meals—an area of frequent requests for religious accommodation. *Ibid.*

In addition, Ohio receives funds that are targeted for "operational efforts," Pet. App. B7, and funds paid out under the State Criminal Alien Assistance Program, *ibid.*, which are unrestricted and may be used for *any* activity or purpose the

[8] Indeed, attempting to use federalism principles to resist full incorporation is a bit like using federalism principles to resist application of the Supremacy Clause. The incorporation doctrine is not about preserving federalism.

recipient chooses. 8 U.S.C. 1231(i); 42 U.S.C. 13710. Under those programs, federal funds reach all aspects of prison administration. RLUIPA vindicates Congress's programmatic interest in ensuring that none of those funds subsidizes religious discrimination or the imposition of unjustified burdens on religious exercise. Just as Congress has an interest in preventing the use of federal funds in any prison program in a manner that discriminates based on race, 42 U.S.C. 2000d (even though not all discrimination based on race is necessarily unconstitutional in the prison context, see *Johnson*, *supra*), or that fails to accommodate individuals' disabilities, 29 U.S.C. 794, Congress has an across-the-board interest in ensuring that federal funds not finance religious discrimination or put the federal government's weight behind policies that unjustifiably impair the ability of prisoners to exercise their faith. See *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974). Because it is helping to fund the program, the federal government has its own interest in how the "play in the joints," *Locke*, 540 U.S. at 718, is worked out.

In that respect, RLUIPA "follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is designed to guard against unfair bias and infringement on fundamental freedoms." *Charles* v. *Verhagen*, 348 F.3d at 607 (internal quotation marks omitted). And that distinct federal interest obtains regardless of whether the funds directly finance the proscribed operations, or whether they make it possible by freeing up funds from other operations, because money is fungible. *Sabri* v. *United States*, 124 S. Ct. 1941, 1946 (2004). Thus, Ohio's insistence (Br. 38) that "this is a case about Ohio's use of its *own*, non-federally generated, resources" is factually baseless and empirically unprovable. It is precisely because it is unknown and unknowable whose funds finance which particular accommodation decisions whether they be decisions about disability or religious accommodations—that

program-wide constraints on the use of federal funds fall within Congress's spending power. See *Lau*, *supra*; *Oklahoma* v. *Civil Serv. Comm'n*, 330 U.S. 127 (1947).

Second, Ohio contends (Br. 38-39) that RLUIPA impermissibly permits private enforcement as a remedy rather than the termination of federal funds. As an initial matter, targeting enforcement efforts at the individuals who have violated conditions on federal funding would seem a markedly less onerous form of enforcement than the rather draconian option of cutting off all federal funding. See *Sabri*, 124 S. Ct. at 1947-1948. In addition, funding termination operates only prospectively. It does nothing to hold funding recipients to the promises they made in obtaining and spending federal funds already received. Beyond that, private enforcement is a commonplace and constitutionally unproblematic feature of spending legislation, as underscored by the willingness of courts to infer private causes of action and damages remedies even when the statute does not expressly provide for them.[9]

Third, Ohio argues (Br. 39) that prisons are an area of state rather than federal concern. The operation of prisons is no doubt an important state task. But prisons are not islands of federalism, especially when operated with federal funding—Title VII, 42 U.S.C. 2000e; Title VI, 42 U.S.C. 2000d; Title IX, 20 U.S.C. 1681(a); the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. 794; the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*; and the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, all apply to state prison operations. See also *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) (applying the

[9] See, *e.g.*, *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Blessing* v. *Freestone*, 520 U.S. 329 (1997); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

Disabilities Act to state prisons despite noting the same language about the States' significant interest in prison administration relied on by Ohio (Br. 39)).

Moreover, Ohio's proposed "core function" limitation (Br. 39) on the spending power cannot be squared with this Court's precedent. "[E]ducation is perhaps the most important function of state and local governments," *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954), and "is primarily a concern of local authorities," *Missouri* v. *Jenkins*, 515 U.S. 70, 131 (1995); see also Va. Br. 22 (listing education as a core area of state sovereignty). But Title VI, Title IX, the Rehabilitation Act, the Individuals with Disabilities Education Act of 1990, 20 U.S.C. 1400 *et seq.*, the Equal Access Act, 20 U.S.C. 4071 *et seq.*, and the Spending Clause programs at issue in *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality), and *Agostini* v. *Felton*, 521 U.S. 203 (1997), all regulate the educational policies of the state and local governments. And the latter four have been upheld against Establishment Clause challenges, even though they implicate the religious policy choices of States in a core area of state and local concern. See *Mitchell*, *supra*; *Agostini*, *supra*; *Mergens*, *supra*; *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

Fourth, Ohio argues (Br. 40-41) that State control over religious policy choices is so foundational that States can never surrender their discretion in exchange for federal funding. That is an extraordinary proposition. If it were true, it would mean that Ohio has been consciously and flagrantly violating the Constitution and federal law by continuing to apply for and receive federal educational and prison funds for years based upon promises it knows it is constitutionally proscribed from keeping, including the application Ohio submitted just last month to the Bureau for Justice Assistance for $1 million in residential substance abuse treatment funding for state prisoners. Beyond that, it is an odd conception of federalism that envisions States knowingly making

promises to the *federal* government, taking *federal* funds based on those promises, and then turning around and asking *federal* courts to rescue them from their own voluntary and considered budgetary judgments.

But, in fact, neither the Religion Clauses nor the Tenth Amendment nor any combination of provisions exempts otherwise valid policies touching religion from the reach of Congress's spending authority. Ohio offers nothing other than *ipse dixit* to support its argument. If criminal defendants can waive all manner of statutory and constitutional rights, there is little basis in law, logic, or history to conclude that the Constitution would not trust sovereign States to exercise equivalent discretion.

2. RLUIPA is valid Commerce Clause legislation

In enacting RLUIPA, Congress also relied upon its Commerce Clause power, but it did so only in those cases where imposition or removal of the substantial burden on religion "would affect[] commerce with foreign nations, among the several States, or with Indian tribes," 42 U.S.C. 2000cc-1(b)(2), unless that effect on commerce, in the aggregate, would not be substantial, 42 U.S.C. 2000cc-1(g). No finding has been made that the Commerce Clause authority is implicated in this case, and there is substantial doubt that some of petitioners' claims (such as the right to assemble for worship or to depart from grooming regulations, Ohio Br. 6-7; Pet. App. B5) would trigger it. Indeed, the district court refused to address the issue because of unresolved factual and legal questions about "the relationship between the internal operation of state prisons and interstate commerce." Pet. App. B9. The court of appeals likewise did not reach the issue.

Ohio nevertheless argues (Br. 34) that it is "vital" for this Court to sustain the judgment below by rendering an advisory opinion on whether RLUIPA is proper Commerce Clause legislation, in order to avert "uncertainty and litigation [for] the States." What is more "vital," however, is for

this Court to adhere to more than two centuries of precedent recognizing that the Court lacks the constitutional power to render advisory opinions, see, *e.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.* (1792), and to equally hoary principles proscribing the issuance of even non-advisory constitutional decisions "unless absolutely necessary to a decision of the case," *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).[10]

In any event, Ohio's arguments are incorrect. Ohio identifies as an "insuperable obstacle" to sustaining RLUIPA a perceived flat prohibition on congressional regulation of non-economic activities. Br. 43 (citing *United States* v. *Morrison*, 529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995)). That objection might be insuperable *if* the Constitution actually contained such a proscription and *if* RLUIPA regulated exclusively non-economic activities. But neither is true.

This Court has never held that Congress's Commerce Clause power reaches only purely economic activities. In fact, *Lopez* eschewed the adoption of such "precise formulations," 514 U.S. at 567, and specifically noted that the inclusion of a jurisdictional element like RLUIPA contains "would ensure, through case-by-case inquiry," that a non-economic activity like simple firearm possession "affects interstate commerce." *Id.* at 561. *Morrison*, likewise, expressly declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity," 529 U.S. at 613, and again referred to the existence of a jurisdictional element like RLUIPA's as an equally relevant factor in as-

[10] See also *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001) (declining to reach Commerce Clause and Tenth Amendment arguments "[b]ecause the Court of Appeals did not address these claims"); accord *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003); *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

sessing the constitutionality of Commerce Clause legislation, *id.* at 611-612.[11]

Furthermore, even if such a flat proscription on regulating non-commercial activity existed, Ohio's facial challenge to RLUIPA would fail because many applications of RLUIPA regulate core economic activity like the operation of prison industries, the interstate purchase of literature, and the interstate provision of meals. U.S. Br. 46 & n.28.[12]

* * * * *

For the foregoing reasons and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

MARCH 2005

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[11] Ohio attempts (Br. 45) to distinguish *United States* v. *Green*, 350 U.S. 415 (1956), which upheld as proper Commerce Clause legislation a similar jurisdictional element in the Hobbs Act, 18 U.S.C. 1951(a), on the ground that the Hobbs Act is directed against property crimes and that all property crimes are "economic activities." That argument is hard to reconcile with *Jones* v. *United States*, 529 U.S. 848 (2000), which expressed serious constitutional doubt that the arson of owner-occupied private residences amounts to economic activity reachable under the Commerce Clause. *Id.* at 857-858.

[12] Ohio's Tenth Amendment arguments (Br. 46-48) overlook that, because RLUIPA is valid Spending Clause and Commerce Clause legislation, its terms do not encroach upon any sovereignty interests retained by the States, *New York* v. *United States*, 505 U.S. 144, 156 (1992), and requiring Ohio "to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on [its] sovereignty," *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). Finally, RLUIPA no more "regulate[s] the way States regulate their prisons" (Ohio Br. 47) than the Rehabilitation Act, Title VI, Title IX, the Americans with Disabilities Act, or numerous other federal laws that apply to prison operations.

(18)

No. 03-9877

In The Supreme Court of the United States

JON B. CUTTER, et al.,

Petitioners,

vs.

REGINALD WILKINSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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INTRODUCTION

In apparent recognition of the fatal flaws in the ruling below, Respondents' brief attempts to radically recast this entire case. They recast its procedural posture, its record, and their principal Establishment Clause arguments. Respondents would have this Court believe that it is reviewing a ruling on a motion for summary judgment, when it is not. They assert that their pejorative characterizations of Petitioners and their religions are based on "uncontested evidence," when they are not. Resp. Br. 3. And, apparently uncomfortable with the Sixth Circuit's rationale, Respondents rely heavily on an unprecedented argument never presented to the courts below.

Notwithstanding Respondents' attempts to recast this case, it is, and has always been, an interlocutory appeal from the District Court's denial of Respondents' "Consolidated Partial Motions to Dismiss" arguing that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) is unconstitutional on its face. J.A. 187. It is not the review of a ruling on a motion for summary judgment based on "uncontested evidence." Although Respondents urged the District Court and the Court of Appeals to treat their motion to dismiss attacking RLUIPA's validity as a motion for summary judgment, both courts declined to do so.[1]

Respondents recast the procedural posture of this case to justify the hyperbolic characterizations of Petitioners

[1] Respondents filed "Consolidated Partial Motions to Dismiss," and the District Court and Court of Appeals disposed of them as such. Because both courts addressed the constitutionality of RLUIPA on its face, the inclusion of documents and affidavits by the parties did not automatically convert Respondents' motion to dismiss into a motion for summary judgment. 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366, at 182-86 (3d ed. 2004). The District Court ruled that the documents in the record were legislative, not adjudicative, facts. Pet. App. B4.

and their religious beliefs as "uncontested evidence." Resp. Br. 3.[2] There is, however, a substantial dispute of material facts unrelated to Respondents' facial attack on RLUIPA. Petitioners flatly deny that their religious beliefs and requests for religious accommodations are part of a huge conspiracy involving prison riots and ten murders. Resp. Br. 6. Petitioners also deny that their religious beliefs "preach violence" and that their religions are affiliated with violent gangs.[3] Resp. Br. 5. These and other of Respondents' assertions are based, in large part, on documents that they dumped into the record under seal – documents that Petitioners' counsel have never been permitted to show to their clients – or on statements from newspaper accounts, newsletters, trade books, and websites never introduced in any adversary proceedings. Resp. Br. 3-7, J.A. 127-84, 199-250.[4]

Petitioners urge this Court not to be distracted by Respondents' efforts to recast the proceedings and the record below. Rather, they urge this Court to uphold RLUIPA on its face because it is a legitimate accommodation of religion that does not violate the Establishment Clause.

[2] FED. R. CIV. P. 12(b)(6) requires that a court ruling on a motion to dismiss for failure to state a claim must accept all of the factual allegations of complaint as true and view them in the light most favorable to the plaintiffs. *Berkovitz v. United States*, 486 U.S. 531, 540 (1988); 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 417 (3d ed. 2004).

[3] *See, e.g.*, Nahal Toosi, *A Wiccan Named Witch is Chaplain at Prison in Wisconsin*, MILWAUKEE J. SENTINEL, Dec. 8, 2001; *Royal Navy to Allow Devil Worship*, CNN.com, Oct. 24, 2004, *at* http://www.cnn.com/2004/WORLD/europe/10/24/uk.devilworship/index.html (British Royal Navy officially recognizes Satanism).

[4] Respondents' documents filed under seal were not redacted until designated for inclusion in the Joint Appendix filed in this Court.

ARGUMENT

I. NONE OF RESPONDENTS' SWEEPING AND UNPRECEDENTED ESTABLISHMENT CLAUSE CLAIMS JUSTIFIES INVALIDATING RLUIPA

A. Respondents' "Libertarian Aspect" Argument Is Unsupported By This Court's Cases And Would Prohibit All Accommodations Of Religion

Respondents argue that the "libertarian aspect" of the Establishment Clause renders RLUIPA unconstitutional because its provisions accommodate inmate religious practice beyond the requirements of the Free Exercise Clause, as interpreted in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Resp. Br. 8-9.[5] Respondents' argument sweeps so broadly that it would invalidate every accommodation not required by the religion clauses, even those currently offered to mainstream faiths in their own prisons. Respondents try to limit the reach of their position by asserting it does not apply to accommodations outside the prison context. Resp. Br. 16, 17. However, every argument Respondents make is equally applicable to nonprison accommodations of religion, and Respondents rely heavily on nonprison cases: *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); and *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). It is presumably for this reason that one of Respondents' own amici disavows

[5] Although Respondents assert that their focus on the prison setting converts their so-far unsuccessful facial challenge into an "as applied" challenge, Resp. Br. 3, all of their arguments address the constitutionality of RLUIPA on its face.

Respondents' "libertarian" Establishment Clause attack on RLUIPA,[6] and another of Respondents' amici rejects the Sixth Circuit's Establishment Clause reasoning.[7]

1. RLUIPA Is A Neutral Accommodation

Respondents argue first that RLUIPA is not religiously neutral, favoring religion over non-religion. Resp. Br. 11-12, citing *Grumet*, 512 U.S. at 703, and Justice Stevens' concurring opinion in *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring). Resp. Br. 11-12. However, *Grumet* addresses sect-based accommodations and holds that they are never constitutional. Moreover, a majority of the Justices in *Grumet* authored or joined opinions, indicating that an accommodation of religion is not unconstitutional favoritism even when it addresses burdens on religion that do not themselves violate the Constitution. *See* Pet. Br. 24. Further, Justice Stevens' position in *Boerne*, that constitutionally permissible religious accommodations must also cover secular activities, has never been adopted by this Court.

2. RLUIPA Does Not Impermissibly Slide Into Favoritism Toward Religion

Respondents argue RLUIPA is an accommodation that "slide[s] over . . . into favoritism." Resp. Br. 13, citing *Texas Monthly*, 489 U.S. at 40 (Scalia, J., dissenting). They say it is "a pro-religious rule about making accommodations." *Id.* However, RLUIPA accommodates religious exercise by articulating an evenhanded standard that states when government burdens are to be lifted. It does not, as Respondents' brief repeatedly suggests, create an automatic

[6] Amicus brief of the Claremont Institute, 4.

[7] Amicus brief of the Commonwealth of Virginia et al., 3-4.

rule reflexively requiring the accommodation of all religious exercise. Resp. Br. 8, 13-14, 23. Rather, RLUIPA carefully preserves the right of prison officials to protect security and other important institutional interests whenever genuinely appropriate. 42 U.S.C. § 2000cc-3(e); RLUIPA § 5(e).

RLUIPA does not give Jews, atheists, or Unitarians, because of their religious status, "a powerful weapon to gain exemptions from whatever prison regulations they wish." Resp. Br. 13. This is twice wrong. First, RLUIPA does not make unpleasant prison rules vanish at the wave of a religious wand. Second, it is not a person's "status" as a believer that triggers RLUIPA, *id.*, it is the "imposition" of a "substantial burden" on sincerely held religious practice. 42 U.S.C. § 2000cc-1(a); RLUIPA § 3(a).

Further, it is unlikely that inmates adhering to "established religions" recognized by the Ohio Department of Rehabilitation and Correction (ODRC), J.A. 202, will have occasion to invoke RLUIPA, because the ODRC already accommodates mainstream religious practices. Resp. Br. 24. If RLUIPA "slide[s] over into favoritism," so do Respondents' current religious accommodations – at least those accommodations not required by the Free Exercise Clause and not matched by a secular equivalent.

Nor does RLUIPA impermissibly favor religious speech over political speech, as Respondents suggest. Resp. Br. 8. *Amos* permits the legislature to lift burdens from religious exercise that are not lifted from other rights. As observed in *Madison v. Riter*, 355 F.3d 310, 319 (4th Cir. 2003), "It was reasonable for Congress to seek to reduce the burdens on religious exercise without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography." Even assuming *arguendo* that the First Amendment does not permit the lifting of burdens on religious literature that are not also lifted from political literature, RLUIPA is still valid. In that event,

avoiding content regulation that violates the First Amendment would be a compelling governmental interest, and RLUIPA would not apply. However, there are many aspects of religious exercise that are distinctive. They include kosher meals, private or group prayer, religious ceremonial items, and the like. Such matters should be addressed on a case-by-case basis on remand, not by invalidating RLUIPA on its face.

3. RLUIPA Does Not Create An Impermissible Perception Of Favoritism

Respondents argue that, due to "prisons' unique dynamics," RLUIPA creates an increased perception of "favoritism" not found outside of prison. Resp. Br. 14-15. However, Respondents' argument does not distinguish RLUIPA from their current religious accommodations. Moreover, religious exemptions outside of prison also generate concerns about favoritism. They have arisen recurrently with regard to the long-standing practice of conscientious exemption from military service. Amicus brief of the National Association of Evangelicals (NAE), 8-9. They have likewise arisen with regard to tax exemptions. *Texas Monthly*, 489 U.S. at 40 (Scalia, J., dissenting).

It is not necessary to decide here whether concerns about perceptions of favoritism play a role in delineating all of the outer boundaries of permissible accommodation. As Respondents themselves point out, "In prison's unique setting . . . State control of inmates' lives is pervasive. . . ." Resp. Br. 2. Therefore, in the prison context, a statute like RLUIPA, which sets a uniform standard for accommodation, is a much fairer and more effective way to avoid any perceptions of favoritism than piecemeal accommodations, that are inevitably haphazard and inconsistent.

Respondents also complain that the Act "elevat[es] the status of beneficiaries across the board." Resp. Br. 13. To

the extent that Respondents are suggesting that RLUIPA is a trump card under which inmates can defeat their keepers, Resp. Br. 14, they are, of course, wrong. The statute, on its face, does not require that all religious exercise be accommodated. 42 U.S.C. § 2000cc-1(a), 3(e); RLUIPA § 3(a), 5(e). It addresses "substantial burdens" that are unjustified by a "compelling governmental interest." *Id.* This standard, the equivalent of strict scrutiny, does not automatically invalidate administrative decisions to deny requests for religious accommodations. It provides the room that prison administrators need to deny requests for accommodation in the face of justified security and administrative concerns. As this Court recently said in *Johnson v. California*, No. 03-636, 2005 U.S. LEXIS 2007, at *28 (Feb. 23, 2005), "Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety." The Ohio Supreme Court apparently agrees. It has held that the Ohio Constitution contains the same standard for measuring religious accommodations in the prison context. *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000) (state prison officials must accommodate the right of prison guards to have religiously-required long hair where there is no compelling government interest justifying prohibition).

4. Incidental Burdens On Third Parties Do Not Violate The Establishment Clause

Respondents posit an inflexible zero-sum game in prisons, such that every gain for one prisoner with regard to religious liberty is an inevitable burden on the religious liberty, or the nonreligious rights, of others. For this proposition, Respondents cite a single sentence from *Turner v. Safley*, 482 U.S. 78, 90 (1987), to the effect that some changes in "the necessarily closed environment of the correctional institution" will have "significant 'ripple

effect[s]' on fellow inmates [and] prison staff." Resp. Br. 19-20. This argument is profoundly flawed.

It is absurd to suggest that all, or even most, accommodations of religious exercise have intolerable "ripple effects."[8] Religious accommodation for one does not automatically mean less religious liberty or reduced safety for others. *See, e.g., Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (providing a kosher diet); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (treating oils for religious use the same as secular oils). However, even assuming that some religious accommodations create undue incidental burdens, that does not justify invalidating RLUIPA on its face.

To the extent that Respondents argue that RLUIPA is invalid because a given accommodation endangers health or security, they are wrong. RLUIPA does not apply to cases in which those compelling government interests are present. To the extent that Respondents are arguing that RLUIPA is unconstitutional on its face because religious accommodations may be used as a cover for gang activity, they misinterpret the statute and improperly use religion as an indiscriminate proxy to address gang problems. *Cf. Johnson v. California*, No. 03-636, 2005 U.S. LEXIS 2007 (Feb. 23, 2005) (race may not be used as a proxy to address gang-related security needs).

Respondents also contend that because RLUIPA's accommodation of religion in the prison context, in their view, inevitably imposes some burdens on third parties,

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[8] This Court made no such suggestion in *Turner*. The passage relied on by Respondents, without strategic ellipses and brackets, reads "*When* accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90 (emphasis added). That is, if a particular accommodation is especially onerous, then prison officials are entitled to more deference with respect to inmates' constitutional claims.

the mere presence of such burdens voids the statute. Resp. Br. 17-20, 24-25. However, if their reasoning were valid, it would also apply to the mainstream religious practices Respondents accommodate on their own. Just as a correction officer's time would be diverted from, say, cell blocks to supervise an Asatru congregation, it is similarly diverted when Respondents supervise a Protestant congregation.

5. RLUIPA Does Not Impermissibly Create Incentives For Religiosity

Respondents' extravagant claim that RLUIPA creates "powerful incentives for religiosity" is equally groundless. Resp. Br. 15. RLUIPA creates no more incentive than religious accommodations already in place. For example, kosher food has been available in federal prisons since *Kahane v. Carlson*, 527 F.2d 492, 495-96 (2d Cir. 1975), and there is no evidence of a mass rush of inmate conversions to Judaism. Likewise, Muslim inmates have had a right to pork-free diets since the late-1960s. *See, e.g.*, *Barnett v. Rodgers*, 410 F.2d 995, 1003 (D.C. Cir. 1969); *Ross v. Blackledge*, 477 F.2d 616, 617, 619 (4th Cir. 1973). And there is no evidence of a mass conversion to Islam either.[9]

If, as Respondents insist, the prison context inevitably creates pressure to adopt whatever religious practices are available "to gain privileges," Resp. Br. 16, this should have happened long ago under Respondents' existing

[9] As noted in Petitioners' and the United States principal briefs, there is also substantial evidence that the "powerful incentives" claim is factually false. RLUIPA has been the law for almost four years and there has not been a groundswell of litigation (let alone successful litigation). Pet. Br. 31, U.S. Br. 23-24. The same is true of federal prisoner claims under the Religious Freedom Restoration Act. *Id.*

religious policies – accommodating the traditional faiths they have selectively chosen to recognize. J.A. 202, 279-80.

6. RLUIPA Does Not Cause Excessive Government Entanglement

Respondents claim that RLUIPA causes entanglement to occur because prison officials must carefully assess the legitimacy and sincerity of each inmate request. Resp. Br. 20. However, legitimacy and sincerity are questions that must be answered for every accommodation request – even those already governed by the standard in *Turner* and *O'Lone*. RLUIPA does not change their consideration in any way.

If anything, RLUIPA reduces entanglement. Currently, some federal courts require inmates seeking an accommodation to show that their religious exercise is required by a basic or central tenet of their religion. *See, e.g.*, *Ford v. McGinnis*, 352 F.3d 582, 593-94 (2d Cir. 2003); *Abdullah v. Fard*, 974 F. Supp. 1112, 1118 (N.D. Ohio 1997), *aff'd*, 173 F.3d 854 (6th Cir. 1999) (unpublished opinion); *Ramsey v. Stewart*, 2000 U.S. App. LEXIS 18682 (9th Cir. 2000); *Beerhide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002). RLUIPA has no central tenet requirement; therefore, it precludes any official need to interpret religious doctrines. 42 U.S.C. § 2000cc-5(7)(a); RLUIPA § 8(7)(A).

7. *Amos* Governs This Case

Respondents mount a series of unavailing arguments claiming that *Amos*, which approves accommodations lifting government burdens on religion, is not really dispositive of this case. Resp. Br. 14-17. Among other things, Respondents claim *Amos* is distinguishable because it only allows government entities to self-correct for burdens they have themselves imposed. Resp. Br. 23-24. In their view, Congress cannot remove an impediment to

religious exercise that it did not impose in the first place. That is not true. It does not matter for Establishment Clause purposes whether a local governmental unit is removing a self-imposed burden, if the state is telling a local government to remove a burden, or if Congress is creating an incentive for state officials to remove state-imposed burdens. In each situation, a government burden on religion is being removed. According to *Amos*, the constitutionality of an accommodation turns on the fact that a pre-existing government burden is being lifted.

Respondents also say that, to the extent an officially tolerated prison religious accommodation goes "beyond constitutional minimums, the State is indeed advancing religion." Resp. Br. 24. However, Respondents assume that there is no government burden on a prisoner's religious exercise unless a prison restriction violates the standard articulated in *Turner* and *O'Lone*. That assumption is wrong. At the moment a person enters prison, his or her individual rights, taken for granted before imprisonment, are lost or are very significantly limited. *Cf. Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 297-99 (1963) (Brennan, J., concurring). Prison officials then determine whether, and the degree to which, inmates will be permitted to engage in activities that approximate those they had prior to incarceration.

To the extent that prison officials choose to accommodate religious exercise, they lift burdens that were imposed at the instant of incarceration. The claim that such accommodations violate the Establishment Clause misunderstands the liberty lost at the time an inmate first walks through the jailhouse doors. It wrongly denies the authority of the legislature to restore some restricted liberty by accommodating religion. Prison officials have discretion, but no constitutional duty, to employ paid chaplains, as one can practice many faiths with and without clergy. And, it is no violation of the Establishment Clause to hire paid

chaplains or to similarly accommodate religious exercise more than *Turner* and *O'Lone* require.

In essence, Respondents claim that every religious accommodation that extends beyond the *Turner*/*O'Lone* minimum is an active endorsement of, or subsidy to, religion. However, to categorize every accommodation of inmate religious exercise as an active endorsement of religious activity – to insist that every religious exercise by inmates is one of the state – mischaracterizes this Court's accommodation rulings. Petitioners seek to buy religious books and ceremonial items with their own funds, over the opposition of public officials. *Cf. Polk County v. Dodson*, 454 U.S. 312, 317-19 (1981). The books are not written with state funds. The ceremonial items are not manufactured by the state. When purchased by Petitioners, neither the books nor the ceremonial items will be owned or endorsed by the state.

B. There Is No Support For Respondents' Federalist Reading Of The Establishment Clause That Would Create A New Constitutional Immunity For The States

Apparently concerned that the reasoning of the Sixth Circuit is not sustainable, Respondents now argue in this Court that there is a "federalism aspect" to the Establishment Clause which supposedly invalidates RLUIPA. According to Respondents, this "federalism aspect" creates a special, affirmative state immunity from federal legislation that encourages or requires state officials to accommodate religious exercise. Resp. Br. 25. Respondents contend that this "federalism aspect" immunizes states from all congressional legislation lifting religious burdens, although otherwise constitutional under Congress' enumerated powers, because it falls inside the "play in the joints" between the religion clauses. *Id.* at 25, 29.

Respondents make a largely originalist argument with little originalist support. They cite no cases, constitutional text, or history to justify the claim that the Establishment Clause immunizes them from RLUIPA. Respondents purport to find the immunity in *Locke v. Davey*, 540 U.S. 712 (2004), which upholds a state's authority to decline to subsidize a pastoral ministry degree, and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which upholds the state issuance of vouchers to parents in order to pay for secular and religious elementary and secondary education. Resp. Br. 25-26. Neither of these cases even remotely supports Respondents' novel claim of immunity from federal legislation otherwise securely within Congress' power. Both address the constitutionality of state statutes, not Congress' own legislative authority.

Respondents' reliance on the text of the Establishment Clause is similarly misplaced. They claim that the words "Congress shall make no law respecting an establishment of religion" mean that Congress can make no laws addressing state burdens on religion. However, Respondents' textual argument turns on the meaning of "no law respecting an establishment of religion." A fair reading of these words is that Congress cannot establish, or perhaps disestablish, religion. There is no historical support for Respondents' Establishment Clause interpretation that would, in effect, create a state immunity from all federal legislation regarding religion. In fact, Rep. Samuel Livermore's proposal to have the Establishment Clause read "Congress shall make no law touching religion, or infringing rights of conscience," was never adopted. NAE Br. 28, citing 1 Annals of Cong. 759 (Aug. 15, 1789).

Nor do Respondents' citations to the historical record support their claim that the Establishment Clause was ratified to provide states a special immunity from federal legislation. Resp. Br. 26-27. Although Respondents quote Madison and Iredell to support their reading of the Establishment Clause, both of the quoted statements were made

during the Constitutional Convention in the midst of debates addressing the language of the unamended Constitution, Resp. Br. 27, not during subsequent debates over the ratification of the Bill of Rights. Madison and Iredell were defending the proposition that establishing or disestablishing religion was not an enumerated power. Neither was addressing Respondents' claim that the Establishment Clause immunizes states from otherwise permissible federal legislation accommodating religion.

Respondents' quotations of historians Curry and Levy are also out of context. Resp. Br. 27. Both quotations refer to the pre-Establishment Clause Constitutional Convention in 1789 and do not specifically address the language or intended purpose of the Establishment Clause at the time of its ratification in 1791. The only quotation in Respondents' brief that actually addresses the Establishment Clause is from JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 702 (Carolina Academic Press 1987) (1833). However, nothing in the quote or related text indicates Story had any hint of Respondents' "play in the joints" theory of "federalism."

What can be said confidently about the historical record is that, at the time of the ratification of the Bill of Rights, it was well understood that none of those rights, including the Establishment Clause, applied to the states. *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 247-48 (1833). It is also true that the Constitution created a government of enumerated powers. However, those historical facts provide no support for Respondents' claim that the Establishment Clause has an independent "federalism aspect" modifying Congress' enumerated powers by creating a state immunity from federal legislation falling in the "play in the joints" between the religion clauses.

Furthermore, there could have been no serious consideration of Congress' authority to condition subsidies in

light of the Establishment Clause at the time of the Bill of Rights' ratification. At that time, the federal government lacked sufficient taxing authority or enough money for there to be meaningful consideration of the appropriate scope of legislative conditions on federal subsidies to state and local governments. NAE Br. 23; DANIEL Q. POSIN & DONALD B. TOBIN, PRINCIPLES OF FEDERAL INCOME TAXATION 11-13 (6th ed. 2003). It was not until the 1930s, well after ratification of the Sixteenth Amendment, that the Court began to seriously address Congress' spending authority and its ability to impose conditions on subsidies. *See United States v. Butler*, 297 U.S. 1 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

There is similarly no support for Respondents' suggestion that the Establishment Clause uniquely limits Congress' commerce power. Resp. Br. 29. At the time of the ratification of the Bill of Rights, the future size and complexity of the nation's economy were unimagined. As a consequence, the drafters of the Establishment Clause had no reason to contemplate whether a federal law precluding states from imposing burdens on religious exercise genuinely affecting interstate commerce would violate the Establishment Clause.

In fact, Respondents' claim that the "federalist aspect" of the Establishment Clause limits Congress' spending and commerce authority really is an effort to rephrase Respondents' Spending and Commerce claims in Establishment Clause language. When Virginia made the same argument in *Madison*, 355 F.3d at 322, Judge Wilkinson remanded it for further consideration as a Spending or Commerce Clause claim. He said, "Although couched in religious terms, this is really a variant of the Commonwealth's many federalism based residual powers contentions. . . ." *Id.*

What in the end is most damaging to Respondents' "federalism aspect" argument, however, is their inability to

account for the transformation wrought by the Fourteenth Amendment. Respondents' argument, that their proposed Establishment Clause immunity survived the ratification of the Fourteenth Amendment, Resp. Br. 29-30, does not follow from their assertion. Assuming *arguendo* that the Establishment Clause originally created an immunity from federal legislation, any such immunity was lost when it was incorporated and applied to the states through the Fourteenth Amendment. *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 8 (1947). It follows from the concept of incorporation that the states lost any original discretion to establish religion or interfere with religious exercise without regard to Congress' constitutional powers.

If Respondent's claim for a new Establishment Clause immunity were to be upheld, it would indiscriminately invalidate federal statutes addressing important national issues when those statutes were inconsistent with state policies accommodating religion. For example, Congress could not require compliance with the Equal Access Act as a condition for public school subsidies. 20 U.S.C. § 4071(a). Similarly, if a deadly strain of influenza were to emerge, Congress might choose to grant money to the states to pay for administration of flu vaccine by state medical personnel. Yet, according to Respondents' argument, Congress would be prohibited from conditioning those subsidies on the recipient states' agreement to require all of their physically able residents to be vaccinated – even those exempted by state law on religious grounds.

II. RLUIPA IS A PROPER EXERCISE OF CONGRESS' SPENDING AUTHORITY

Respondents' Spending Clause argument assumes Congress lacks the authority to impose conditions on state corrections subsidies that discourage recipient correction

officials from burdening religious exercise. Respondents assert that RLUIPA's conditions on federal subsidies are impermissible because they are not "closely related," Resp. Br. 36, "closely connected," *id.* at 37, and lack a "functional nexus" to the subsidies, *id.* at 42. However, none of Respondents' formulations accurately state the constitutional test for a condition on a federal subsidy.

As Respondents concede, this case is governed by *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987), which holds that Congress can impose "conditions . . . *related* to the funding it is providing." Resp. Br. 36 (italics added). The relatedness requirement is further amplified by *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003), a decision that Respondents do not mention, which reiterates the established rule that "Congress has wide latitude to attach conditions to the receipt of federal assistance to further its policy objectives."

Respondents cite *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) as the source for their more restrictive standard. Resp. Br. 37. However, the case cuts against Respondents' position. It upheld an across-the-board funding condition requiring state recipients to prohibit employees working in federally funded programs from participating in the management of political campaigns. The condition even extended to political activities unrelated to work and occurring on employees' personal time. Moreover, this Court has also upheld across-the-board conditions on federal funds to public schools, requiring that recipients accommodate religious, noncurricular student groups. *Bd. of Educ. of the Westside Cmty Schs. v. Mergens*, 496 U.S. 226, 247, 253 (1990).

Respondents further argue that Congress has no interest in assuring that state corrections programs burdening religious exercise in violation of national policy do not use federal funds. They say that Congress' interest

under RLUIPA is "wholly unrelated" and "completely disconnected" to the burdens that Ohio places on religious exercise. Resp. Br. 38. However, Congress previously asserted its interest in lifting burdens on religious exercise when it enacted the Religious Freedom Restoration Act. Surely Congress has an interest in assuring that its funds are not used to support programs that needlessly burden religion. And, it also has an interest in discouraging burdens that limit inmate opportunities for rehabilitation. Pet. Br. 40.

Respondents contend that the relatedness standard previously employed by this Court should be narrowed because RLUIPA provides a judicial remedy. They claim that RLUIPA's judicial remedy makes the Spending Clause conditions approved in prior cases different because they only provide for a loss of federal funds. Resp. Br. 38-39. Respondents' argument would have this Court invalidate the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2). If Respondents do not wish to be covered by RLUIPA's judicial remedy, they need not accept federal corrections funds. In the absence of those funds, RLUIPA's Spending Clause conditions do not apply.

Virginia's amicus argues that RLUIPA is coercive because it applies to all federal subsidies and therefore "threaten[s] the loss of an entire block of federal funds. . . ." Virginia Br. 25, quoting *West Virginia v. United States Dep't of Health & Human Servs.*, 289 F.3d 281, 291 (4th Cir. 2002).[10] However, almost all courts that have considered the question of coercion have measured it by the percentage of a government unit's budget that is lost through noncompliance, and no court has ever held that the small fraction of Respondents' funds coming from

[10] Under Virginia's approach, because money is fungible, recipients can evade a spending condition by using the federal money to free up state funds for activities that violate congressional policies.

federal grants in this case is coercive. Pet. Br. 45 n.23. Even the West Virginia case cited by Virginia's amicus brief upheld the spending condition. In addition, this Court has approved an across-the-board requirement that public schools receiving federal money adhere to the Equal Access Act, even though the burden of loss of the federal funds might be so heavy that it would be "an unrealistic option." *Mergens*, 496 U.S. at 241.

III. THE CONSTITUTIONALITY OF RLUIPA UNDER THE COMMERCE POWER SHOULD BE ADDRESSED ON A CASE-BY-CASE BASIS

Respondents argue that RLUIPA is beyond Congress' commerce authority because Congress cannot regulate "non-economic activity [that] substantially affects interstate commerce." Resp. Br. 43. However, Petitioners' claims include interference with their efforts to purchase religious books and ceremonial items that are actually in interstate commerce. In addition, Petitioners also believe that other burdens imposed on their religious exercise substantially affect interstate commerce. Congress has plenary power to regulate all activities that genuinely affect interstate commerce regardless of whether the activities are economic or noneconomic. *See, e.g.*, *Lottery Case*, 188 U.S. 321 (1903); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The degree to which an activity or policy of state correction officials affects interstate commerce, and whether that activity or policy can be regulated by Congress, are matters to be decided on a case-by-case basis by the District Court applying RLUIPA's jurisdictional element, 42 U.S.C. § 2000cc-1(b)(2); RLUIPA § 3(b)(2), not in an appeal addressing RLUIPA's facial validity.

CONCLUSION

RLUIPA is constitutional on its face and does not violate the Establishment Clause; therefore, the decision of the Court of Appeals to the contrary should be reversed. The additional issues raised by Respondents should be remanded for further proceedings.

Respectfully submitted,

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JON B. CUTTER, ET AL.,

Petitioners,

v.

REGINALD WILKINSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN CORRECTIONAL CHAPLAINS ASSOCIATION, FORMER STATE CORRECTIONS OFFICIALS, STATE PRISONERS, PRISON FELLOWSHIP, JEWISH PRISONER SERVICES INTERNATIONAL, ALEPH, THE AMERICAN CATHOLIC CORRECTIONAL CHAPLAINS ASSOCIATION, ADVENTIST CHAPLAINCY MINISTRIES, CITIZENS UNITED FOR THE REHABILITATION OF ERRANTS, THE JOHN HOWARD ASSOCIATION, SHAMBALA PRISON COMMUNITY, THE PRISON DHARMA NETWORK, AND ROBERT C. LYNN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

Amici curiae, whose identities and individual statements of interest are provided in the Appendix, are current and former prison chaplains, former state corrections officials, current state prisoners, and private religious and civil rights organizations.[1] *Amici*'s diverse experiences with prison-related issues lead them to the common conclusion that the provisions of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 ("RLUIPA") (codified at 42 U.S.C. § 2000cc *et seq.*), at issue in this case are not only sound as a matter of constitutional law, but very important as a matter of public policy.[2]

Specifically, *amici* believe the elimination of undue governmental constraints on religious exercise by prisoners is a worthy and important goal that can inure to the benefit not only of those in confinement, but of the wider society as well. This goal, moreover, can be realized without significantly burdening prison administrators and without compromising prison safety and security—as demonstrated by experience with RLUIPA itself, with the federal Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 ("RFRA") (codified at 42 U.S.C. § 2000bb *et seq.*), and with numerous religious accommodation policies voluntarily undertaken by the States themselves. *Amici* submit this brief because the resolution of this case will decide the fate of a key safeguard of prisoners' religious freedom.

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] In this brief, unless otherwise noted, "RLUIPA" refers to section 3 of the statute, 42 U.S.C. § 2000cc-1, which contains the provisions relating to institutionalized persons.

SUMMARY OF THE ARGUMENT

In RLUIPA, Congress acted to encourage the States to extend to state prisoners an important protection that Congress had previously granted to federal prisoners in the Religious Freedom Restoration Act. The various legal challenges to that effort will be ably and fully rebutted by the parties to this case and by other *amici curiae*. Accordingly, rather than attempt a comprehensive defense of RLUIPA, this brief will draw on *amici*'s diverse experiences with religious exercise in prisons generally, and with RLUIPA specifically, to make two narrow but important points.

First, RLUIPA was designed to further, and does in fact further, important objectives that "provide for the . . . general Welfare" (U.S. Const. art. I, § 8), are closely related to the federal interest in funding state prisons, and are wholly consistent with the Establishment Clause.

As to the latter, this Court has long taught that the accommodation of religious practice by private actors is, by itself, a legitimate secular purpose of legislation for Establishment Clause purposes. RLUIPA was enacted for that purpose, and in that respect is in line with the many legislative accommodations of religious exercise that this Court has upheld over the years. Correlatively, RLUIPA furthers the legitimate secular goal of ensuring that federal tax dollars are not used in a way that undermines federal policy on religious freedom.

But these are not the only ways in which RLUIPA furthers the general welfare. Congress also understood that, for many prisoners, the ability to practice their faiths plays a central role in their ability to rehabilitate themselves while in prison and after release. Accordingly, by promoting religious accommodation in prisons, RLUIPA promotes the important secular objective of helping to rehabilitate religiously inclined prisoners and ex-prisoners. This too is a valid, secular purpose, and its effectuation is therefore a permissible effect.

Second, RLUIPA accomplishes these congressional objectives in a way that does not undermine the compelling interests of prison administrators in maintaining order and security in their institutions. The fear of skeptics and critics of RLUIPA (and of RFRA before it) that the legislation would open the door to a flood of bogus and disruptive claims has not materialized. To the contrary, the statute was expressly designed *not* to condone specious claims and *not* to interfere with the States' obviously compelling interest in prison security—and it has not done so.

One reason for that is that the courts have proven well able to separate the wheat from the chaff. They routinely dismiss RLUIPA claims that either are insincere or would pose a credible threat to prison order or safety. Moreover, as illustrated by the claims of the state prisoners who have joined this brief (and who prevailed in the other courts of appeals that have upheld RLUIPA), the typical claim under RLUIPA is not the manipulative or disruptive gambit foreseen by some opponents of the statute. It is, rather, a reasonable request for accommodation of a benign religious ritual or practice—such as a kosher diet or access to prayer oil. Nor has RLUIPA inaugurated a wave of vexatious litigation; in fact, the statute's passage saw no discernible increase in the volume of prisoner lawsuits.

In short, the accommodation of religious liberty that RLUIPA promotes is both permissible as a matter of constitutional law and sound—or at the very least reasonable—as a matter of public policy. The Sixth Circuit erred in refusing to respect the legitimate policy choices that Congress made when it passed this important statute.

ARGUMENT

I. RLUIPA FURTHERS IMPORTANT SECULAR OBJECTIVES THAT ARE CLOSELY RELATED TO THE FEDERAL INTERESTS SERVED BY PRISON FUNDING.

As this Court has held repeatedly, the accommodation of religious exercise is a legitimate secular purpose that does not offend the Establishment Clause. See, *e.g.*, *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 335 (1987) ("it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions") (citing and applying *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971)). The logical corollary, equally grounded in this Court's decisions, is that the alleviation of government-imposed burdens on religious exercise is a permissible *effect* of legislation under the Establishment Clause. See *id.* at 336-37 (citing *Lemon*, 403 U.S. at 612). It could hardly be otherwise; it would be an odd rule indeed that a purpose is permissible but its realization is not. Cf. *Case* v. *Bowles*, 327 U.S. 92, 102 (1946) ("Since the decision in *McCulloch* v. *Maryland*, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end . . . to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution.") (internal citation omitted). Accordingly, this Court's decisions leave no doubt that the easing of state-imposed burdens on private religious practice does not have the "principal or primary effect" of advancing religion. *E.g.*, *Amos*, 483 U.S. at 336-37; *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970).

As explained below, RLUIPA has both the purpose and the principal effect of lifting (or encouraging States to lift) government-imposed burdens on religious exercise by prisoners, while at the same time ensuring that programs supported by federal tax dollars do not unnecessarily thwart religious exercise. RLUIPA also furthers the important objective of facilitating the rehabilitation of prisoners in whose lives religion plays an important role. All of these are permissible purposes and effects for purposes of the Establishment Clause. For purposes of the Spending Clause, all of these objectives likewise promote the general welfare and are plainly "related" to the "federal interest" in funding state prison programs. *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978) (plurality op.)).

A. RLUIPA Furthers the Secular Objectives of Accommodating Religious Fellowship and Worship and of Ensuring that Federal Tax Dollars Are Not Used to Thwart Religious Exercise.

1. The cardinal purpose of RLUIPA—"alleviation of government burdens on prisoners' religious exercise," *Madison* v. *Riter*, 355 F.3d 310, 317 (4th Cir. 2003)—is a legitimate secular objective sanctioned by this Court's long-standing Establishment Clause jurisprudence. As this Court reaffirmed only last term, there is ample room for "play in the joints" between the Establishment Clause and the Free Exercise Clause of the First Amendment. *Locke* v. *Davey*, 124 S. Ct. 1307, 1311 (2004); see also *Walz*, 397 U.S. at 669. Thus, "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. *Accord Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality op.) (disclaiming the proposition that all "benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause"). Accordingly, even without a predicate free exercise violation, "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations"—and individuals as well—"to define and carry out

their religious missions." *Amos*, 483 U.S. at 335. And Congress therefore has "ample room under the Establishment Clause" to lift governmentally imposed burdens on private religious exercise. *Id.* at 334.

The achievement of that purpose is also a permissible "effect" for purposes of the *Lemon* analysis, as a comparison to *Amos* demonstrates. In *Amos*, the Court found not only that accommodating religion was a valid secular purpose, but that the specific exemption at issue there—the Title VII exemption for religious employers—did not violate the other two parts of the *Lemon* test. As to the "effects" inquiry, the Court held that the exemption did not have the principal or primary effect of advancing religion because Congress itself was not advancing religion: "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Id.* at 337. Rather, the Title VII exemption "allows *churches* to advance religion, which is their very purpose," *id.* (emphasis added, emphasis in original omitted), and the exemption cannot be unconstitutional for that reason.[3]

Contrary to the Sixth Circuit's analysis, *Cutter* v. *Wilkinson*, 349 F.3d 257, 263-64, 267 (6th Cir. 2004), RLUIPA satisfies the effects requirements of *Lemon* even more readily than did the Title VII exemption in *Amos*. In eliminating unnecessary government interference with religious exercise, RLUIPA does not—as a facial matter—have the primary effect of advancing religion. Instead, by its terms RLUIPA simply helps religious prisoners *themselves* exercise their liberty to practice their faiths. No government "activities and

[3] Furthermore, the exemption created no excessive entanglement of church and state because it "effectuate[d] a more complete separation of the two and avoid[ed] the kind of intrusive inquiry into religious belief." 483 U.S. at 339.

influence" are necessarily enlisted to advance the cause of religion. 483 U.S. at 337.[4]

It also bears emphasizing that, despite the wide range of religious practices to which RLUIPA applies, see *Cutter*, 349 F.3d at 263, the statute is far narrower than the Title VII exemption in one crucial respect. The Title VII exemption applies categorically to all activities of non-profit religious employers whether or not the activities are directly related to the employer's religious operations. See *Amos*, 483 U.S. at 332 n.9 (describing 1972 amendment to Title VII expanding the scope of the exemption); see also 42 U.S.C. § 2000e-1. Despite some prior suggestions that such "exceptionless" accommodations may in some circumstances violate the Establishment Clause, see *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709-10 (1985), the *Amos* Court upheld the Title VII exemption.

By comparison, the accommodation of religious practice mandated by RLUIPA is less exacting because the rights secured by RLUIPA are contingent on the institution's ability to maintain order and security. By allowing a prison to defeat a claim under the statute's compelling interest standard, Section

[4] To be sure, accommodation of religious exercise, like everything else in prison, requires some action by the State. That is the nature of prison; a prisoner cannot do anything—eat, sleep, shower, read, write, have a phone conversation—without the State's active involvement. But within that necessarily hands-on environment, RLUIPA calls on the State to assume a decidedly hands-*off* posture relative to religious practice: not to become involved in religious exercise, but to make reasonable allowances for private religious exercise. The fact that such allowances, like everything in prison, may entail some affirmative steps by the State has no bearing on the constitutional analysis.

Similarly, there can be no serious argument that RLUIPA somehow creates an impermissible entanglement of church and state. On the contrary, RLUIPA requires prison officials to accommodate all religious believers (including minority believers) in a neutral fashion, and that neutrality helps to avoid situations in which interference with particular religious practices might yield an excessive entanglement.

3 of RLUIPA forges a balance between prisoners' important interest in exercising religion and compelling interests of the State. 42 U.S.C. § 2000cc-1(a) (setting forth compelling interest standard); see also *infra* Section II. And, unlike the sometimes significant burdens on others that are entailed by the Title VII exemption in *Amos*, the burdens RLUIPA imposes on prison administrators are quite modest, usually involving little more than a reallocation of allotted resources. Thus, RLUIPA's satisfaction of the "purpose" and "effects" analyses required under *Lemon* follows *a fortiori* from *Amos*.

2. RLUIPA also furthers the related secular objective of ensuring that federal tax dollars do not support state programs that unnecessarily thwart religious exercise. As one commentator put it during the congressional hearings, "[t]he Federal interest here is simply . . . that Federal funds should not be used unnecessarily to impose burdens on religious exercise." *Hearing Before the Senate Comm. on the Judiciary: Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure*, 106th Cong. 73 (1999) ("*Hearing*") (statement of Douglas Laycock, University of Texas School of Law). As the Ninth Circuit has recognized, "Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion. . . . Congress may allocate federal funds freely, then, to protect the free exercise of religion . . . ." *Mayweathers* v. *Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), *cert. denied sub nom. Alameida* v. *Mayweathers*, 124 S. Ct. 66 (2003). *Accord Charles* v. *Verhagen*, 348 F.3d 601, 608-09 (7th Cir. 2003). Or, as the Eleventh Circuit recently put it, even where a state prison is not violating inmates' federal free exercise rights, "Congress has every right to ensure that state prisons that accept federal funds respect the religious freedom of prisoners." *Benning* v. *Georgia*, Nos. 04-10979 & 04-11044, 2004 WL 2749172, at *6 (11th Cir. Dec. 2, 2004).

Indeed, Congress may legitimately act to ensure that federal funds are not used to inhibit religious exercise just as surely as the federal government may administer federal lands in a manner that does not obstruct religious practices. See *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988) ("The Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."). In fact, Congress has enacted legislation requiring the federal government to protect the rights of Native Americans to exercise traditional religions through "access to sites" and "the freedom to worship through ceremonials and traditional rites." American Indian Religious Freedom Act, Pub. L. No. 95-341, § 1, 92 Stat. 469, 469 (1978) (codified at 42 U.S.C. § 1996). Similarly, the executive branch has directed that, in managing federal lands, responsible executive branch agencies shall, to the extent practicable, "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." Exec. Order No. 13,007, § 1, 61 Fed. Reg. 26,771, 26,771 (May 24, 1996). Just as the federal government may accommodate religious exercise through the administration of federal lands—a practice this Court sanctioned in *Lyng*—so too may Congress promote the general welfare by advancing the accommodation of religious exercise through federal funding.

For all these reasons, ensuring the appropriate use of federal funds is yet another valid secular purpose and effect of RLUIPA. And it is obviously closely related to the "federal interest" in funding state prisons, which would be undermined if those prisons used fungible federal funds, in part, to thwart federal policy on religious freedom. *Dole*, 483 U.S. at 207.

B. By Promoting the Accommodation of Religious Exercise in Prisons, RLUIPA Facilitates the Important Objective of Prisoner Rehabilitation.

Apart from the legitimate Congressional interest in freedom of religion as such, the accommodation of religious exercise in prisons produces significant corollary benefits, which Congress recognized in passing RLUIPA and which the statute demonstrably advances. Incarceration imposes profound handicaps on the ability of religious individuals to observe their faiths. Apart from private prayer, even the most basic forms of religious exercise, such as worship and devotional study—let alone such things as religiously mandated diet and dress—simply are not possible without the state's affirmative acquiescence.

One consequence is that persons for whom religion provides solace and stability are deprived of that outlet, and in a circumstance in which they may need solace and stability more than ever. As one prison administrator put it, prisoners "'don't have many hope pegs to hang your being on' . . . 'Religion is one of those hope pegs.'" Ari Goldman, *Sing Sing Inmates Hail Plan to Offer Kosher Meals*, N.Y. Times, Sept. 6, 1993, at 20.

Unsurprisingly, then, to the extent religiously inclined prisoners are relieved of the burden on religious exercise that ordinarily accompanies incarceration, those prisoners tend to be better equipped to deal with the severity of imprisonment, and more well-adjusted both in prison and out, than they would be without that accommodation. Indeed, as shown below, a growing body of research indicates that, for prisoners for whom religion is an important part of life, accommodating religious exercise tends both to ease the adjustment to prison life and to facilitate rehabilitation. By ensuring that the exercise of religion behind prison walls is not unnecessarily fettered, RLUIPA advances these important objectives.[5]

1. Accommodation of Religious Exercise Aids Rehabilitation by Helping Prisoners Adjust to Prison and by Improving Prison Order.

In the experience of *amici*, one of the principal roles that religious accommodation can play in prisons is to help prisoners adjust to the harshness of the prison environment. In debating the legislation that became RLUIPA, even opponents of the statute conceded the important rehabilitative role played by accommodating religious exercise.

> [E]very correction administrator in the country recognizes the vital role played by most religious practices and beliefs in furthering inmate rehabilitation, in maintaining a sense of hope and purpose among individual inmates and in enhancing overall institutional safety and well-being. Most inmates who sincerely practice their religious beliefs do not pose institutional problems. Rather, as a rule of thumb, they promote institutional stability.

Hearing, at 175 (statement of Glenn S. Goord, Commissioner, New York State Department of Correctional Services).

Recent studies indicate that religious accommodation is profoundly important to the rehabilitation of many prisoners. For one thing, those studies show that genuine religious practice is widespread, deeply influencing the day-to-day lives of a great many prisoners. For example, a major study of relig-

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[5] This is not to say that religious accommodations are valuable only—or even primarily—because of their instrumental value. Religious liberty is the first freedom guaranteed by the Bill of Rights, and accommodating religion is inherently important. *See, e.g.*, *Amos*, 483 U.S. at 334 (noting history of protection for religious freedom in the United States). Thus, even if a particular religious exercise produced no rehabilitative or other impact on prisoners or society at large, accommodating that religious exercise would always be an invaluable protection of prisoners' civil rights.

ious activity in a large South Carolina prison found that "[r]eligious practice in prison can be very extensive with about 50% of inmates attending religious services an average of six times per month." Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. Offender Rehab. 11, 28 (2002). And a recent census of Oregon state prisoners showed that 52 percent of them are involved in religious activities. Thomas P. O'Connor et al., *Home for Good in Oregon: A Community, Faith and State Re-entry Partnership to Increase Restorative Justice*, Corrections Today, Oct. 2004, at 73, *available at* http://www.oregon.gov/DOC/TRANS/docs/pdf/home_4_good.pdf; see also Bryon R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 Just. Q. 145, 146 (1997) (noting that a 1991 survey showed that "nearly one inmate in three is involved in religious programs").

The evidence suggests, and *amici*'s own experience confirms, that such activities have a substantial impact. A national study of the role of religion in the adjustment to prison, which surveyed prisoners at 20 prisons, found that religiosity (measured as a composite of religious activity, attitudes, and beliefs) was positively correlated with self-esteem and with the degree to which prisoners felt adjusted to prison. Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 127, 150-51 (2002). These religiously active prisoners were also less likely to suffer from depression. *Id.* at 151; *see also* Harry R. Dammer, *The Reasons for Religious Involvement in the Correctional Environment*, 35 J. Offender Rehab. 35, 41 (2002) (describing how many prisoners achieve "peace of mind" from religious observance, which is "important for the psychological survival of inmates").

The benefits of religious accommodation extend beyond the religious prisoners themselves. One study found that religiosity is often a "principal determinant" in the number of disciplinary infractions that a prisoner receives, with fewer infractions among those prisoners who have greater religious activity and belief. Clear & Sumter, *supra*, at 154. These findings mirror those of the South Carolina study, which concluded that "the more religious sessions an inmate attended, the less likely he was to have an [in-prison] infraction." O'Connor & Perreyclear, *supra*, at 26.[6]

The recent experience of a California prison provides another stark example of the potential impact of religious accommodation on prisoners' adjustment to prison life. That prison, which had long been plagued by gang violence, experienced a sharp drop in the number of riots and other violent incidents after a large group of its prisoners participated in a religious studies program. Don Thompson, *Officials: Prison Program Answer to Our Prayers*, Miami Herald, May 13, 2004, at 7. As one administrator put it, the religious program within that prison "'has definitely played a role'" in reducing in-prison violence. *Id.*

2. Accommodation of Religious Exercise in Prison Furthers the Objective of Reducing Recidivism.

In the experience of *amici*, religious accommodation also reduces recidivism among those who choose to participate in religious services and other activities. And once again, this experience is supported by the available evidence. See O'Connor & Perreyclear, *supra*, at 28-29.

For example, a study comparing recidivism rates of prisoners participating in an intensive prison ministry

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[6] The few studies that have detected no statistical differences in prisoner behavior typically were not measuring overall religious participation but were instead comparing participants within a specific program versus those without. *See, e.g.*, Johnson et al., *supra*, at 149-50; Bryon R. Johnson, *Religious Programs and Recidivism Among Former Inmates in Prison Fellowship Programs: A Long-Term Follow-Up Study*, 21 Just. Q. 329, 336-38 (2004).

program with the general prison population found significantly lower long-term (eight- to fourteen-year) recidivism rates among program participants. Mark C. Young et al., *Long-Term Recidivism Among Federal Inmates Trained as Volunteer Prison Ministers*, 22 J. Offender Rehab. 97, 104, 110-11 (1995). Another study, using follow-up data on prisoners who had been incarcerated in twelve prisons around the country, found that those who had participated regularly in religious activities had significantly lower recidivism rates in the six and a half years following their release. Melvina T. Sumter, *Religiousness and Post-Release Community Adjustment, Graduate Research Fellowship—Executive Summary* 10 (Sept. 25, 2000), *available at* http://www.ncjrs.org/pdffiles1/nij/grants/184509.pdf. And a study of participants in a ministry operating in four New York state prisons found that greater participation was linked to lower rates of re-arrest in the year following the prisoners' release. Johnson et al., *supra*, at 160. Indeed, one commentator opined that "[s]piritual development and religious study are perhaps 'the most valuable tools for rehabilitation and to prevent recidivism.'" Jamie Aron Forman, Note, *Jewish Prisoners and Their First Amendment Right to a Kosher Meal: An Examination of the Relationship Between Prison Dietary Policy and Correctional Goals*, 65 Brook. L. Rev. 477, 484 & n.45 (1999) (quoting *Hearings on the Need for Fed. Prot. of Religious Freedom After Boerne v. Flores Before the Comm. on the Judiciary*, 105th Cong. 5 (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute)).

Congress clearly had in mind such secular benefits when it sought to promote the accommodation of religion in the prison context. As one Senator put it, accommodating the religious practices of prisoners "helps rehabilitate them and makes them less likely to commit crime after they are released." *Hearing* at 20 (statement of Sen. Strom Thurmond).

Many of the benefits of religious exercise in prison can be traced to the extensive contact between prisoners and volunteers, who tend to be "a group of people who ha[ve] learned how to successfully negotiate and derive satisfaction from the different worlds of work, family, education, politics, and religion." O'Connor & Perreyclear, *supra*, at 20. Given that "offenders tend to have trouble negotiating these areas of life, and . . . problems in these areas are predictive of crime and recidivism," positive interactions with volunteers fills a crucial need in many prisoners' lives. *Id.* *Amici*'s own experience confirms that religious volunteers are important exemplars of social stability for prisoners.

Religiously-motivated volunteers, moreover, make up the largest cohort of volunteers working in prisons. For example, 77 percent of the volunteers in the Oregon prison system last year were associated with the Religious Services department. See Dep't of Corr. Transitional Servs. Div., *Volunteer Programs*, available at http://www.oregon.gov/DOC/TRANS/religious_services/rs_vision02.shtml (last viewed Dec. 15, 2004). The 1500 volunteers associated with Religious Services donated over 100,000 hours of work, the equivalent of 55 full-time employees. *Id.* Similarly, the South Carolina study found that "232 [religious] volunteers donated about 21,316 hours of work to the prison: the equivalent of 11 full-time paid positions." O'Connor & Perreyclear, *supra* at 23; see also *Hearing Before the Subcomm. on Terrorism, Tech., and Homeland Sec. of the Senate Comm. on the Judiciary*, 108th Cong. 32 (2003) (statement of Paul Rogers, President, American Correctional Chaplains Association) (noting that "[o]f civilians who choose to participate in various prison activities, the vast majority is Religious Program volunteers"). Indeed, "in many prisons, the *only* groups engaged in rehabilitative programs are religious ones." David

Cole, *Faith Succeeds Where Prison Fails*, N.Y. Times, Jan. 31, 2001, at A21.[7]

Furthermore, prisoners' involvement in religious activities allows them to interact with prison chaplains, a group institutionally dedicated to the goal of prisoner rehabilitation. Jody L. Sundt & Francis T. Cullen, *The Correctional Ideology of Prison Chaplains: A National Survey*, 30 J. Crim. Just. 369, 377-78 (2002). In *amici*'s experience, regular, voluntary contact with prison chaplains likewise tends to reduce both short-term and long-term recidivism.

Further study is required to understand fully the dynamics at work here. But the evidence, confirmed by *amici*'s own experience, demonstrates that voluntary religious programs are "a potent and a cost-effective resource in the national effort to reduce the negative effects of crime on individuals and the community." Young et al., *supra*, at 115. Taken together, current research suggests that these programs "must be considered in the mix of variables and 'best correctional practices' related to offender rehabilitation," O'Connor & Perreyclear, *supra*, at 30. Indeed, at a time when "we have all but given up on rehabilitation as 'soft on crime,'" voluntary religious programs offer an important alternative for rehabilitating prisoners in preparation for their re-entry into society. Cole, *supra*, at A21.

For all these reasons, the accommodation of religious exercise in prison—within relevant constitutional limits—is of surpassing importance. It is a legitimate secular purpose and effect for purposes of the Establishment Clause. And it promotes the general welfare in a way that is closely related to the federal interest in supporting state prisons, including the

[7] Such volunteer programs are also cost-effective. While other effective rehabilitation programs cost in the range of $14,000 per prisoner per year, the South Carolina study found that the annual cost of programs using religious volunteers "could be considered a bargain at about $150 to $250 per inmate served." O'Connor & Perreyclear, *supra*, at 23.

strong federal interest in rehabilitation. See *Dole*, 483 U.S. at 207.

Congress, therefore, was right to decide that accommodation of religious exercise would make valuable contributions to the penal system as well as the lives of individual prisoners. At a minimum, that judgment was a reasonable one, and the Sixth Circuit erred in second-guessing it.

II. RLUIPA'S STRICT SCRUTINY STANDARD HARMONIZES RELIGIOUS ACCOMMODATIONS WITH THE STATES' COMPELLING INTERESTS IN PRISON SECURITY AND ORDER.

Notwithstanding the important benefits RLUIPA provides to prisoners and society, opponents of the statute maintain that it is unwise and dangerous as a matter of policy. Such arguments take several forms, but the common motif is that the statute threatens prison order and security by upsetting the balance of power between prisoners and administrators.

Aside from their irrelevance to the constitutional questions before the Court,[8] these criticisms are demonstrably wrong as a factual matter. Despite the rhetorical force of the image of mass conversion to the "Church of the Filet Mignon"—or, more gravely, racist and dangerous activity undertaken under the banner of religion—the reality is far different. As illustrated by the claims of the prisoner *amici* here, typical claims brought under RLUIPA are in fact sincere, modest, and be-

[8] For one thing, arguments of those sort are, at bottom, a policy dispute with Congress. For another, they generally constitute as-applied challenges masquerading as facial challenges. *See, e.g.*, Brief of Ohio and Other States as *Amici Curiae* at 3-8, 17-18, *Benning* v. *Amideo*, 2004 WL 2749172 (11th Cir. Dec. 2, 2004) (Nos. 04-10979 & 04-11044) (discussing the potential for prison violence that inheres in some ostensibly religious objects and practices, and asserting that violent prisoners sometimes manipulate and abuse religious rights). The question whether a *particular* accommodation should be granted under RLUIPA is not relevant to the facial challenge at issue here.

nign. And RLUIPA leaves the States with ample legal tools to handle any risks that religious accommodation might otherwise create in the prison setting.

1. As a factual matter, there is little support for the cynical view that prisoners resort to religion to secure special consideration from authorities. In one recent study, researchers were surprised to find very little evidence suggesting that prisoners were opportunistically using religion to achieve privileges or fewer restrictions inside their facilities. Todd R. Clear et al., *The Value of Religion in Prison: An Inmate Perspective*, 16 J. Contemp. Crim. Just. 53, 63 (2000). According to these researchers, "[r]eligiously active inmates flatly denied that they received special treatment by parole or prison authorities." *Id.* Significantly, even non-religious prisoners doubted that religious activity actually led to special favors within the prison. *Id.*

If anything, religious exercise often involves burdens that a prisoner would not undertake in the absence of authentic religious faith. To cite a common example, the kosher requirements of some prisoners are frequently accommodated with a cold "common fare" meal. The religious prisoner must therefore sacrifice a hot meal in favor of a cold one that does not violate religious dietary laws. Fasting and other ascetic traditions that can be accommodated in prison similarly entail significant sacrifices on the part of the prisoner. And, prisoners professing religious beliefs are sometimes subject to taunts and derisive comments by other, non-religious prisoners.

In these and other ways, an expressed desire for a religious accommodation—which is a predicate for a claim under RLUIPA—carries with it costs and burdens that will themselves have a tendency to discourage phony claims. Cf. *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (noting that the costs associated with religious identification "will act as a check on institutions that falsely identify themselves as religious merely to obtain exemption from the [National Labor Relations Act]."). Thus, as the

available evidence shows (and as the experience of *amici* confirms), there is in reality little risk that prisoners would, to any significant degree, engage in sham religious exercises or expressions of religious belief.

2. In the experience of *amici*, moreover, the vast majority of claims under RLUIPA involve religious practices that pose no colorable threat to prison order or security. The anecdotes and hypotheticals often invoked by RLUIPA's opponents are far less typical than the claims brought by the prisoner *amici* here, who prevailed in the other federal courts of appeals that have upheld RLUIPA's constitutionality. See *Benning*, 2004 WL 2749172; *Madison*, 355 F.3d at 317-22; *Charles*, 348 F.3d at 611; *Mayweathers*, 314 F.3d 1062. Those cases involved requests for a kosher diet (Ira Madison and Ralph Benning); for prayer oil (Jerry Charles); for permission to attend weekly religious services (the *Mayweathers* plaintiffs); for permission to wear a yarmulke (Mr. Benning); and for permission to wear religiously significant beards (the *Mayweathers* plaintiffs).[9]

Although these kinds of requests pose no colorable threat to prison security, they are often denied by prison administrators. As two of RLUIPA's Senate sponsors put it, "prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of re-

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[9] *See also, e.g.*, *Agrawal* v. *Briley*, No. 02 C 6807, 2003 WL 22839813, at *3 (N.D. Ill. Nov. 25, 2003) (denying motion to dismiss RLUIPA claim by Hindu prisoner for religious diet); *Gordon* v. *Pepe*, No. Civ.A.00-10453-RWZ, 2004 WL 1895134, at *4 (D. Mass. Aug. 24, 2004) (allowing RLUIPA claim for religiously motivated vegetarian diet); *Boles* v. *Neet*, 333 F. Supp. 2d 1005, 1010 (D. Colo. 2004) (allowing RLUIPA claim for refusal to allow Jewish prisoner to wear religious garments while being transported for medical treatment); *Goodman* v. *Snyder*, No. 00 C 0948, 2003 WL 22765047 (N.D. Ill. Nov. 20, 2003) (allowing RLUIPA claim for religious diet and tarot cards); *cf. Aiello* v. *Frank*, No. 03-C-0127-C, 2003 WL 23277415, at *1 (W.D. Wis. June 3, 2003) (granting prisoner leave to state RLUIPA claim for denial of tallith, yarmulke, and prayer book).

sources, some institutions restrict religious liberty in egregious and unnecessary ways." 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy ("Joint Statement")).

Moreover, relief often cannot be had under the First Amendment alone, which requires only that a prison regulation be "reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). See, *e.g.*, *DeHart* v. *Horn*, No. 03-4250, 2004 WL 2709924, at *6, *11 (3d Cir. Nov. 30, 2004) (affirming grant of summary judgment for defendants on Buddhist prisoner's First Amendment claim for religious diet, citing "the Prison's legitimate interest in efficient food provision" and finding that accommodation would impose more than "a minimal burden on the Prison," but remanding for consideration of corresponding claims under RLUIPA); cf. *Hammons* v. *Saffle*, 348 F.3d 1250, 1255-58 (10th Cir. 2003) (affirming grant of summary judgment for defendants as to prisoner's First Amendment claim based on denial of access to prayer oil, but remanding to the district court for consideration of identical claim under RLUIPA). Thus, in the run of cases, RLUIPA satisfies a substantial need for prisoner-claimants while posing very little risk to sound prison administration.

3. Just as importantly, RLUIPA erects substantial obstacles that prisoners must overcome before they can win an accommodation. And the track record of both RLUIPA and RFRA, which is identical to RLUIPA in the relevant respects,[10] shows that those obstacles are both real and effective at preserving prison security and discipline.

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[10] *See* 42 U.S.C. § 2000bb-1(b) (RFRA § 3(b)) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

First, the statute places on the prisoner the burden of establishing both the sincerity of his religious claim and the substantial burden imposed by the challenged regulation. 42 U.S.C. § 2000cc-2(b) ("the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion"); see also *Murphy* v. *Missouri Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir.) ("RLUIPA requires that Murphy show, as a threshold matter, that there is a substantial burden on his ability to exercise his religion."), *cert. denied*, 125 S. Ct. 501 (2004). This is not empty verbiage: under both RLUIPA and RFRA, the courts have proved perfectly capable of filtering out insincere claims and insubstantial burdens at the pleading or summary judgment stage. See, *e.g.*, *Boyd* v. *Arizona*, 87 F.3d 1317 (9th Cir. 1996) (table), 1996 WL 341273, at *2 (affirming grant of summary judgment in favor of prison officials who had denied prisoner's request under RFRA to "study scriptures with his wife daily, hold family prayer with his wife daily, . . . and render physical affection to his wife while he is in prison"); *Rogers* v. *Hellenbrand*, No. 03-C-230-C, 2004 WL 433976, at *1, *6 (W.D. Wis. Mar. 4, 2004) (granting partial summary judgment on prisoner's RLUIPA claim predicated on supposedly religious "auditory and visual hallucinations," where "plaintiff has failed even to adduce evidence identifying his religious beliefs or indicating how he practices or observes his religion"), *aff'd*, No. 04-1918, 2004 WL 2698957 (7th Cir. Nov. 24, 2004); *Winters* v. *State*, 549 N.W.2d 819, 820-21 (Iowa 1996) (affirming dismissal of RFRA claim by white supremacist prisoner that sharing a cell with an African-American prisoner substantially burdened his religious exercise); *Loden* v. *Peters*, No. 92 C 20209, 1995 WL 89951, at *10 & n.4 (N.D. Ill. Mar. 1, 1995) (under RFRA, holding that denial of prisoner's request to worship nude in a prison chapel did not substantially burden his religious exercise).

Second, the rights secured by RLUIPA (in contrast to many religious exemptions) are not absolute but contingent. Far from creating an unconditional right to religious exercise, RLUIPA explicitly assigns countervailing weight to the burdens on prison administrators. Because the statute's "compelling interest" and "least restrictive means" inquiries are inherently contextual, their application to a given case will necessarily take account of any relevant institutional exigencies. As the Senate sponsors of RLUIPA explained, "[t]he compelling interest test is a standard that responds to facts and context." Joint Statement, 146 Cong. Rec. at S7774, S7775.

The compelling interest standard leaves ample room for deference to prison officials on matters of prison security. Indeed, RLUIPA's Senate sponsors clearly indicated their expectation "that courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Id.* at S7775 (internal quotation marks omitted).

The lower courts, moreover, have had no difficulty acting in accordance with this expectation. As the Seventh Circuit aptly noted in a RFRA decision that applies equally to RLUIPA, "maintaining order in prisons is a compelling governmental interest and one that frequently requires and so justifies limitations on freedom of religious conduct." *Mack* v. *O'Leary*, 80 F.3d 1175, 1180 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997); accord *Hamilton* v. *Schriro*, 74 F.3d 1545, 1554 (8th Cir. 1996) ("a court applying RFRA must give due deference to the expertise of prison officials in establishing regulations to maintain prison safety and security, even when the court applies a 'heightened' standard of review").

Here again, the substantial number of unsuccessful prisoner claims under RLUIPA and RFRA bear out Congress's expectation, even as they demonstrate that the strict scrutiny standard, faithfully applied to the special circumstances of a prison, amply protects the States' compelling interest in prison order and security. See, *e.g.*, *Charles* v. *Frank*, 101 Fed. App. 634, 636 (7th Cir.) (holding that denial of prisoner's request to wear prayer beads satisfied strict scrutiny because "suppressing the open display of religious emblems is necessary to stop gangs from usurping them as indicia of membership"), *cert. denied*, 125 S. Ct. 479 (2004); *Fawaad* v. *Jones*, 81 F.3d 1084, 1087 (11th Cir. 1996) (rejecting RFRA challenge to prison rule limiting prisoners' latitude in changing their names); *Ulmann* v. *Anderson*, No. Civ. 02-405-JD, 2004 WL 883221, at *8 (D.N.H. Apr. 26, 2004) (entering summary judgment for defendants on detainee's RLUIPA claim, holding that denial of request for a glass menorah for security reasons satisfied strict scrutiny); *Farrow* v. *Stanley*, No. CIV.02-567-B, 2004 WL 224602, at *10 (D.N.H. Feb. 5, 2004) (rejecting RLUIPA claim for a Native American sweat lodge because, *inter alia*, its use would require "intensive monitoring" and its construction "would require inmates to have access to tools that would create security concerns"); *Charles*, 220 F. Supp. 2d at 946-47 (granting summary judgment for prison officials on Muslim prisoner's RLUIPA claim based on denial of request for two annual religious feasts, citing compelling "security and resource concerns"); *Jones* v. *Roth*, 950 F. Supp. 254, 257-58 (N.D. Ill. 1996) (rejecting RFRA challenge to prison policy regulating the time and manner of prayer).

These decisions illustrate the seriousness with which reviewing courts take the States' interests in security and order. The claims in these cases (and many others) were rejected, not because the claimants had failed to show a substantial burden on religion, but because the challenged regulations were deemed narrowly tailored to the government's compelling interest in the safety and security of its prisons. Thus, not only insincere claims, but also sincere claims that colorably

threaten prison security, will fail on the merits—and typically on dispositive pre-trial motions.

4. Nor is there any support for the claim by RLUIPA's detractors that the statute will subject prison administrators to a flood of lawsuits. Indeed, in passing RLUIPA, Congress had before it a letter supporting RLUIPA's passage from the authorities overseeing federal prisons. The letter reported that, in the six years that the Bureau of Prisons ("BOP") had been required to apply RFRA—which applies the same substantial burden standard as RLUIPA—BOP had not been overwhelmed by frivolous prisoner lawsuits. The letter stated unequivocally that "RFRA has been in effect in the Federal Prison system for six years and compliance with that statute has not been an unreasonable burden to the Federal prison system." 146 Cong. Rec. at S7776 (July 19, 2000, letter from Assistant Attorney General Robert Raben to Sen. Orrin Hatch).

BOP's sanguine view was amply justified by the text of RLUIPA. To minimize the risk that claims under RLUIPA would lead to unreasonable litigation burdens, Congress expressly subjected such claims to the Prisoner Litigation Reform Act. See RLUIPA § 4(e), 42 U.S.C. § 2000cc-2(e) ("Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act)."). The Prison Litigation Reform Act of 1995 ("PLRA")[11] cabins the prospective relief available to prisoners in civil actions related to prison conditions (PLRA § 802, 18 U.S.C. § 3626), requires exhaustion of administrative remedies prior to filing a lawsuit (PLRA § 803, 42 U.S.C. § 1997e), amplifies the procedural requirements for filing *in forma pauperis* actions (PLRA § 804, 28 U.S.C. § 1915), and adds a judicial screening mechanism to review

[11] Pub. L. No. 104-134, tit. VIII §§ 801-810, 110 Stat. 1321-66, 1321-66 to 1321-77 (1996) (codified in scattered sections of titles 18, 28, and 42 of the United States Code).

potentially frivolous actions (PLRA § 805, 28 U.S.C. § 1915A). As the Senate sponsors of RLUIPA noted, "[t]he Prison Litigation Reform Act is working effectively to control frivolous prisoner litigation across the board, without barring meritorious claims equally with frivolous ones." Joint Statement, 146 Cong. Rec. at S7775. By subjecting RLUIPA actions to the requirements of the PLRA, Congress ensured that courts and prison administrators would not be overwhelmed by new prisoner litigation.

In fact, as recent studies have shown, neither RLUIPA nor RFRA has had any measurable impact on the volume of prisoner lawsuits. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1583 tbl. I.A, 1584 fig. I.A, 1586 fig. I.B (2003) (showing that the enactment of RFRA was not followed by a noticeable increase in the number of federal civil rights claims by prisoners (as a proportion of the overall prison population), and RLUIPA's enactment was in fact followed by a slight *decrease* in such suits); accord Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y (forthcoming 2005) (finding that only 59 RLUIPA cases were filed in the 50 state prison systems in the four years following the statute's passage). Furthermore, as a general rule, statutory claims for religious accommodation are only a fraction of the prisoner claims faced by prison administrators. See Joint Statement at S7775 (citing studies showing "that religious liberty claims are a very small percentage of all prisoner claims, that RFRA led to only a very slight increase in the number of such claims, and that on average RFRA claims were more meritorious than most prisoner claims"); see also Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. Davis L. Rev. 573 (1999). There is, therefore, no truth to the suggestion that RLUIPA has resulted in waves of frivolous or malicious actions from prisoners.

* * * * *

In short, far from providing a basis to second-guess Congress's policy judgment, the evidence amply confirms that RLUIPA not only serves the important goal of protecting individual prisoners' rights to exercise their religion, but also serves the over-riding purpose of prisoner rehabilitation. The available evidence also confirms the judgment expressed by the Fourth Circuit "that RLUIPA should not hamstring [states'] ability" to maintain safety and order in [their] prisons. *Madison*, 355 F.3d at 321.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

The **American Correctional Chaplains Association (ACCA)** is a national association of professional chaplains, founded in 1886 and affiliated with the American Correctional Association. The ACCA membership represents chaplains of all faith groups in federal, state and local jurisdictions. The mission of the ACCA is to serve as a professional organization for pastoral care personnel in the corrections field; provide a network for the sharing of information and resources amongst its members and with corrections administrators; to formulate standards for chaplaincy and religious programming in correctional facilities; develop and implement certification for correctional chaplains (recognized as the industry standard); and communicate the religious and spiritual aspects of corrections to the larger community.

Robert C. Lynn, a former president of ACCA, currently serves as treasurer of the Association's Northwest region and as pastor of the Skyline Christian Church in Takoma, Washington. He was Religious Program Administrator for the Washington State Department of Corrections for 14 years, and currently serves on the Department's Religious Advisory Committee. Rev. Lynn also served 31 years as an Air Force chaplain before retiring as Command Chaplain, Fourth Air Force, at the rank of Colonel.

Walter J. Dickey and Chase Riveland (collectively, the "**corrections *amici***") are former senior state corrections officials with extensive experience in prison management matters.

Mr. Dickey has served as Administrator of the Wisconsin Department of Corrections and as Chair of Governor Tommy Thompson's Task Force on Corrections, and as a member of the U.S. Justice Department's Sessions on Sentencing and Corrections. A widely published author on corrections issues, Mr. Dickey also has taught at the University of Wisconsin–Madison Law School since

1976.

Mr. Riveland has served as Secretary of Corrections for the State of Washington, Executive Director of the Colorado Department of Corrections, and Deputy Director of the Wisconsin Department of Corrections. Mr. Riveland currently teaches corrections-related courses at the National Institute of Corrections Academy in Colorado and serves as an independent corrections consultant.

Ralph Benning, Ira W. Madison, Jerry Charles, and the Prison Law Office (collectively, the "**prisoner *amici***") are prisoners or attorneys representing prisoners who have successfully defended the constitutionality of RLUIPA in every one of the cases—other than the decision below—to reach the federal circuit courts on this issue. The prisoner *amici* have directly benefited and continue to benefit from RLUIPA's promotion of religious accommodations in prison, and in three of their four cases, litigation under RLUIPA is ongoing.

Mr. Benning is a Georgia prisoner and "Torah observant Jew" who filed suit under RLUIPA when he was denied a kosher diet and a yarmulke. After Mr. Benning prevailed in a motion to dismiss in the district court, Georgia sought immediate appellate review under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1292(b). The Eleventh Circuit affirmed. *Benning* v. *Georgia*, Nos. 04-10979, 04-11044, 2004 WL 2749172 (11th Cir. Dec. 2, 2004). The Eleventh Circuit's mandate has not yet issued.

Mr. Madison, a Virginia state prisoner, filed suit under RLUIPA when his requests for a kosher diet were denied by Virginia prison officials. The district court granted summary judgment to the defendants on Mr. Madison's RLUIPA claims, and the Fourth Circuit reversed. See *Madison* v. *Riter*, 355 F.3d 310 (4th Cir. 2003). The defendants sought this Court's review of the Fourth Circuit's ruling, and that petition for certiorari remains pending, 72 U.S.L.W. 3658 (U.S. 2004) (No. 04-1404).

Mr. Charles, a Wisconsin prisoner who had been prohibited from possessing Islamic prayer oil in his cell, challenged that denial under RLUIPA. The district court ruled that this denial violated RLUIPA, *Charles* v. *Verhagen*, 220 F. Supp. 2d 937 (W.D. Wis. 2002), and subsequently upheld the constitutionality of RLUIPA, 220 F. Supp. 2d 955 (W.D. Wis. 2002). The Seventh Circuit affirmed. *Charles* v. *Verhagen*, 348 F.3d 601 (7th Cir. 2003). As a result of his litigation success, Mr. Charles is currently permitted to possess prayer oil.

The Prison Law Office is a nonprofit public interest law firm devoted to protecting the constitutional rights of California prisoners. Located just outside the gates of San Quentin, it has been in the forefront of legal efforts to enforce the Constitution and other laws inside the walls of California's prisons. It currently represents a class of Muslim prisoners (collectively, the "*Mayweathers* plaintiffs") in litigation that, over the past seven years, has sought accommodations to allow the plaintiffs (i) to attend Friday afternoon religious services known as Jumu'ah and (ii) to wear half-inch beards. The district court originally granted the *Mayweathers* plaintiffs preliminary injunctive relief, and California appealed. The Ninth Circuit affirmed the preliminary injunctions, *Mayweathers* v. *Newland*, 314 F.3d 1062 (9th Cir. 2002), and this Court denied the defendants' petition for certiorari, *Alameida* v. *Mayweathers*, 124 S. Ct. 66 (2003). Recently, the district court granted summary judgment in favor of the plaintiffs and entered a permanent injunction, *Mayweathers* v. *Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004), and the defendants have again appealed to the Ninth Circuit, Nos. 04-16470, 04-16861 (9th Cir. July 28, 2004).

Prison Fellowship is a non-profit, charitable religious organization founded in 1976 by Charles W. Colson and cur-

rently operating in every state and in 106 countries. It ministers to prisoners, ex-prisoners, and their families.

Jewish Prisoner Services International (JPSI) originated as an agency of B'nai B'rith International and was restructured nine years ago into a separate non-profit chaplaincy service. JPSI works in conjunction with all major branches of Judaism and the Jewish Community's other social services agencies to assist Jewish prisoners and their families worldwide. In addition to conducting its own programs, JPSI provides support to localized Jewish chaplaincy programs and is extensively involved with various corrections industry organizations.

Aleph is a non-profit Jewish educational, humanitarian, and advocacy organization. Aleph helps Jewish inmates and their families to maintain essential connections to each other and to their spiritual heritage and provides educational materials to children of Jewish inmates, counseling to spouses, parents and children, and financial assistance to families in need.

The **American Catholic Correctional Chaplains Association (ACCCA)** is a national Catholic organization committed to promoting the principles of restorative justice for all involved with, or affected by, the criminal justice system. Restorative justice is Bible-based and views crime as affecting victims, offenders, their families and the community at large.

Adventist Chaplaincy Ministries (ACM) is comprised of trained chaplains from the Seventh-day Adventist Church. Through the ministry of these chaplains, ACM responds to the spiritual needs of those within unique institutional situations, including the correctional, educational, healthcare, and military settings.

Citizens United for the Rehabilitation of Errants (CURE) is a national membership organization dedicated to reducing crime through reform of the criminal justice system, chiefly prison reform. Most of CURE's 15,000 members are prisoners, former prisoners, and families of prisoners.

CURE's two goals are (1) to use prisons only for those who have to be in them, and (2) for those who have to be in them, to provide them all the rehabilitative opportunities they need to turn their lives around.

The **John Howard Association (JHA)** is a 103-year-old corrections reform organization that concerns itself with the conditions of confinement in prisons, jails, and juvenile detention centers in Illinois and elsewhere, and that promotes fair, safe, and humane corrections policies and practices that meet the needs of both the offender and the community. JHA recruits and trains citizen volunteers who participate in over 70 correctional facility monitoring visits each year. In these monitoring visits JHA staff members and volunteers speak to countless corrections officials, chaplains, program administrators, and incarcerated individuals, and observe correctional programs in action.

The **Shambhala Prison Community (SPC)** and the **Prison Dharma Network (PDN)** are involved in Buddhist prison ministry. As practitioners of a minority religion and one that is frequently misunderstood, SPC and PDN often encounter resistance when prisoners request their services. The protections afforded by RLUIPA enhance SPC's and PDN's ability to bring their services to persons confined to state prisons.

No. 03-9877

IN THE

Supreme Court Of The United States

JON B. CUTTER, ET AL.,

Petitioners,

v.

REGINALD WILKINSON, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN JAIL ASSOCIATION, ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, NATIONAL MAJOR GANG TASK FORCE, NATIONAL SHERIFFS' ASSOCIATION, NEW YORK STATE SHERIFFS' ASSOCIATION, AND NORTH AMERICAN ASSOCIATION OF WARDENS & SUPERINTENDENTS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae submit this brief in order to provide the Court with an understanding of the problem presented by gang violence in correctional institutions, and how that problem is impacted by the Religious Land Use And Institutionalized Persons Act.[1]

The American Jail Association is a national, non-profit organization formed in 1981. It is dedicated to supporting those who work in and operate the Nation's jails. It conducts training conferences and certification programs for jail officers and managers, and is the publisher of *American Jails* magazine. The association has approximately 4,200 members nationwide.

The Association of State Correctional Administrators is a not-for-profit organization formed in 1970. Its membership consists of the Directors of Corrections for the 50 States, the Federal Bureau of Prisons, and four large urban jail systems, as well as U.S. territories and commonwealths. The Association's major goals are to influence and shape correctional policy; to identify proven correctional practices, standards, and performance measures; and to share with its members training and professional development programs designed to enhance members' professional skills and awareness of advancements in the profession.

The National Major Gang Task Force is a non-profit organization formed in 1993 for the purpose of minimizing the effects of security threat groups, gangs and terrorists in

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[1] Letters of consent to the filing of this brief have been submitted to the Court. No counsel for any of the parties authored this brief in whole or in part. Furthermore, no person or entity, other than the *amici curiae*, their members or their counsel, made any monetary contribution to the preparation or submission of this brief.

jails, prisons and communities. It conducts annual training conferences, conducts studies, and partners with corrections and law enforcement officials throughout the country, regarding gang intervention and management strategies. The National Major Gang Task Force has approximately 1,600 members nationwide.

The National Sheriffs' Association was founded in 1940 to represent the criminal justice and law enforcement activities of the Nation's 3,088 Offices of Sheriff, including the operation of local jails. It is a non-profit association with over 21,000 members. Among other things, it provides training to jail officers and supervisors, and prepares jail manuals, guidelines and handbooks relating to all aspects of jail operations.

The New York State Sheriffs' Association is a non-profit organization formed in 1934 for the purpose of assisting Sheriffs in the efficient and effective delivery of Sheriffs' services to the public, including maintenance and operation of county jails. Among other things, it develops accreditation standards for jail administrators, and conducts conferences and training sessions for jail administrators and other supervisory jail officers. The Association is composed of all Sheriffs in the State of New York.

The North American Association of Wardens & Superintendents is a non-profit organization formed in the 1940s. It is committed to promoting and supporting the needs of jail and prison wardens, superintendents and administrators throughout North America. It provides a forum, through conferences and newsletters, for jail and prison officials to share and exchange information and ideas, and offers training workshops in connection with other professional organizations. The Association has approximately 900 members throughout the United States and Canada.

SUMMARY OF ARGUMENT

Correctional institutions are highly regulated environments in which security concerns dominate. In particular, gang violence is one of the most pressing problems currently facing corrections administrators throughout the country. One recent survey has estimated that approximately one-fourth of all inmates in adult male state correctional institutions are gang members. The rate is even higher in maximum security institutions, with roughly one-third of the inmate population belonging to a gang or other security threat group. As the evidentiary record in this matter reveals, controlling gang violence is not simply a matter of administrative convenience, but literally a matter of life and death for inmates and correctional staff.

Given the highly regulated nature of correctional institutions, participation in religious services is one of the few opportunities for inmates to obtain special privileges or exemptions from normal limitations on daily activities. Gang members are aware of the legal protections afforded to religious practice, and unfortunately, seek to take advantage of these special privileges. Gang members use religious affiliation and practice for recruitment and identification of members, and as a means of organizing criminal activities in correctional institutions.

The least restrictive means test -- mandated by the Religious Land Use And Institutionalized Persons Act ("RLUIPA") and the former Religious Freedom Restoration Act ("RFRA") -- has greatly exacerbated gang members' abuse of religious accommodations. Specifically, the least restrictive means test has: (1) promoted the proliferation of various religions, including numerous pagan "religions" dominated by white supremacists, such as Odinism and Asatru; (2) caused the number of inmate "religious" demands to skyrocket, creating an excessive burden on correctional

chaplains and officials, and often causing a reduction in the provision of religious services to inmates; and (3) caused an excessive entanglement of corrections officials with religion by forcing those officials to scrutinize closely every claimed "religion" and every request for "religious" accommodation. In sum, RLUIPA restricts the ability of corrections officials to address the security problems presented by gangs in correctional institutions throughout the country.

ARGUMENT

I. Gangs And Gang Violence Are Among The Most Pressing Concerns In The Highly Regulated Corrections Environment.

Correctional institutions are highly regulated environments in which security concerns dominate. Even seemingly "administrative or technical concerns," including "uniformity of schedule, appearance, and diet," involve considerations of security. *See Developments In The Law -- The Law Of Prisons, In The Belly Of The Whale: Religious Practice In Prison*, 115 Harv. L. Rev. 1891, 1891, 1899 (2002) ("Developments"). Corrections administrators must consider not only the administrative costs of a policy, but also the "likelihood of inmate resentment, the appearance of discrimination, and the possibility of inmates manipulating the system for personal advantage[.]" *Id.* at 1899.

Gangs and gang violence are the primary threats to management of the highly regulated corrections environment. *See* Fleisher, Mark S. and Decker, Scott H., *An Overview Of The Challenge Of Prison Gangs*, Corrections Management Quarterly (Winter 2001) at 2. In fact, the problem of gangs and gang violence in correctional institutions is widespread and growing. A 1999 survey of correctional institutions in 47 states concluded that approximately "one fourth of all male inmates confined in adult state correctional institutions are

gang members." Knox, George W., Ph.D., *A National Assessment Of Gangs And Security Threat Groups (STGs) In Adult Correctional Institutions: Results Of The 1999 Adult Corrections Survey*, Journal Of Gang Research, Vol. 7, No. 3 (Spring 2000) ("A National Assessment") at 5. This represented a dramatic increase from the 1991 gang density level of only one in ten male inmates. *Id.*

Furthermore, it is widely agreed that gangs are "responsible for most prison violence." Fleisher, *supra*, at 5. A 1985 study, for example, found that gangs "caused 50 percent or more of the prison violence" at a time when gang density was estimated at only three percent of the prison population. *Id.* A 2002 study of gang violence in Arizona correctional institutions concluded that gang members "commit serious disciplinary violations at rates two to three times higher than do non-gang inmates housed in units of the same security level" and "members of certified prison gangs (STGs) recorded the highest violation rates in the case of assault, drug violations, rioting, weapons violations, and other violent violations." Fischer, Daryl R., Ph.D., *Arizona Department Of Corrections: Security Threat Group (STG) Program Evaluation, Final Report* (National Criminal Justice Reference Service 2002) at ii; *see also* Gaes, Gerald G., et al., *The Influence Of Prison Gang Affiliation On Violence And Other Prison Misconduct*, The Prison Journal, Vol. 82, No. 3 (2002).[2]

Indeed, the increase in gang density during the 1990s corresponded to an increase in gang violence within adult state correctional institutions. In 1992, "only one out of ten institutions reported gang members being a problem in terms of assaults on the staff." Knox, A National Assessment, *supra*, at 6. By 1999, however, "about one-third of all adult

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[2] The Knox, Fischer and Gaes studies cited above are available online at http://www.ncjrs.org/gangs/publications.html.

state correctional institutions would report gang members as a problem in terms of assaults on staff." *Id.* Similarly, in 1992, only "a fourth of the institutions reported gang members as a problem in terms of threats against staff members." *Id.* at 7. By 1999, that percentage had increased to one half of all correctional institutions. *Id.*

The problem of gangs and gang violence is particularly acute in maximum security institutions because gang density increases by level of institutional security. "[I]n a typical maximum security adult state correctional institution, in the year 1999, about 32.7 percent of the inmates could be expected to be gang/STG members." Knox, A National Assessment, *supra*, at 5. This is not surprising given that the "highest security prisons hold the most violent and disruptive inmates who are most likely to be as disruptive inside as they were outside." Fleisher, *supra*, at 2.

The evidentiary record in this matter confirms the findings of the scholars and researchers discussed above. For example, Matthew Meyer is the former Security Threat Group/Investigation Coordinator for the Ohio Department of Rehabilitation and Correction ("ODRC"). Affidavit Of Matthew Meyer at ¶ 1 (Jt. App. 229). As Mr. Meyer explained, gang activity "is a very serious problem with ODRC's institutions" and "is a significant cause of violence between inmates as a result of intra and inter-gang disputes." *Id.* at ¶ 2 (Jt. App. 230). Furthermore, gang activity "creates alternate power structures" that "pose a direct threat to ODRC's ability to maintain safety and security within its prisons." *Id.* (Jt. App. 230).

Mr. Meyer's deposition testimony provides a stark illustration of the very real threat of violence posed by gang members in ODRC's institutions. Mr. Meyer, for example, provided the following testimony regarding one of the putative class members in this case:

Q. Do you know why he received Level 3 participation?

A. Yes I do.

Q. Could you tell me.

A. He received it for sure – for one reason, from the fact that he killed Officer Davis in '92 at Mansfield.

Q. And could you tell me again what Level 3 meant.

A. Disruptive.

Q. Could you read the paragraph below notes.

A. Yes. It says inmate killed CO Davis in '92 at Mansfield. Incident believed to be Aryan Brotherhood related.

Q. What was the ethnicity of Officer Davis?

A. He was black.

Deposition Of Matthew Meyer at 62-63 (Jt. App. 148). Similarly, another putative class member was involved with the stabbing of a black inmate as a result of a power fight within the Aryan Brotherhood. *Id.* at 70 (Jt. App. 154). Finally, Mr. Meyer offered the following testimony:

Q. Let me put it this way: Could you please mention any personal

experiences you have to support your conclusion in Paragraph 3 of your affidavit.

A. Well, I guess one of the – the biggest experiences I have is the Lucasville – SOCF riot on April 11th, 1993, wherein a group of inmates – actually three different security threat groups were involved in a riot which took the lives of, I believe, nine inmates and one staff member, cost the State roughly $63 million.

Id. at 82 (Jt. App. 159). In short, control of gang activity within correctional institutions is not simply a matter of administrative convenience, but literally a matter of life and death for inmates and correctional staff.

II. Gang Members Seek Religious Accommodations In Order To Obtain Exemptions From The Highly Regulated Corrections Environment.

Given the highly regulated nature of correctional institutions, the practice of religion presents one of the few opportunities for inmates to obtain special privileges or exemptions from normal limitations on daily activities. "Inmates who are members of religious groups in correctional facilities are entitled to be accommodated in accordance with their religions' mandates, and thus 'religious' inmates receive special privileges." Davis, Heather, *Comment: Inmates' Religious Rights: Deference To Religious Leaders And Accommodation Of Individualized Religious Beliefs*, 64 Alb. L. Rev. 773, 784 (2000). These special privileges often include possession of religious literature and objects, and accommodations for diet and appearance. *Id.*

The practice of religion also provides one of the few opportunities for inmates to meet in a group setting. In the federal prison system, for example, the "chapel is one of the few areas . . . where large numbers of inmates are permitted to meet as a group and to converse." *A Review Of The Federal Bureau Of Prisons' Selection Of Muslim Religious Services Providers* (U.S. Department of Justice, Office of the Inspector General April 2004) ("Review") at 39. In short, "belonging to a religious group while incarcerated is one of the few ways to actually receive more privileges and alter the conditions of confinement." Davis, *supra*, at 784-785.

Gang members are well aware of the legal protections afforded to religious practice, and unfortunately, seek to take advantage of these special privileges. In one survey of prison gang members, one third of the members admitted that their groups had used "religion as a 'front' for gang business." Zaitzow, Barbara H., Ph.D. and Houston, James G., Ph.D., *Prison Gangs: The North Carolina Experience*, Journal Of Gang Research, Vol. 6, No. 3 (Spring 1999) at 29. As one scholar concluded, "[u]nder law today, almost anything, including witchcraft, could be protected as an established system of beliefs (i.e., having the protections afforded to mainstream religions). Prison inmates in America have certainly discovered this loophole." Knox, George W., Ph.D., *An Introduction To Gangs* (New Chicago School Press 2000) ("Introduction To Gangs") at 232; *see also* Affidavit Of Matthew Meyer at ¶¶ 16-17 (Jt. App. 234-235) (gangs "frequently use religion to facilitate and cover their illicit activities"); Affidavit Of David Schwarz at ¶¶ 11-12 (Jt. App. 202) ("many gangs have adopted 'religious' postures to [] obtain protection for their illicit activities").

The ability to meet in a group setting is one of the most powerful privileges, which gang members abuse by becoming religious adherents. "[I]nmates who are otherwise

separated can come together to attend congregate religious activities, where they can plan and execute the operations of their [gang]." Affidavit Of Matthew Meyer at ¶ 16 (Jt. App. 234). "Gang members in prison know this routine: they go to chapel to act like they are a prayer group, but it is just a meeting place for the gang members to transact business." Knox, Introduction To Gangs, *supra*, at 21.

For example, a gang operating in a District of Columbia prison "used 'religious' activities to facilitate prostitution, drug dealing and the production and distribution of pornography within that prison." Affidavit Of Matthew Meyer at ¶ 16 (Jt. App. 235); *see also* Frey, Sara Anderson, *Comment: Religion Behind Bars: Prison Litigation Under The Religious Freedom Restoration Act In The Wake Of Mack v. O'Leary*, 101 Dick. L. Rev. 753, 772-773 (1997). Similarly, in Wyoming, prison officials "felt compelled by RFRA to allow a group of 'Luciferians' to have an unsupervised service in the prison chapel. In an apparent burst of religious enthusiasm, the Luciferian inmates burned Christian hymnals and Bibles . . . causing substantial smoke damage to the Chapel . . . and, obviously, creating a significant safety hazard to the life and safety of all inmates and staff within the institution." Tucker, Kim, *Preliminary Results Of The RFRA Survey Of All States: The Impact Of The Religious Freedom Restoration Act On State Correctional Systems* (Florida Attorney General's Office 1996) at n.3 (Jt. App. 213).

Abuse of religious accommodations is particularly rampant among white supremacist gangs. "Christian Identity and Asatru/Odinism are the two religions most commonly used by white supremacists to get religious privileges[.]" *Dangerous Convictions: An Introduction To Extremist Activities In Prisons* (Anti-Defamation League 2002)

("Dangerous Convictions") at 35.[3] "Asatru" is "an Icelandic term for an ancient pagan Northern European religion that has been revived in modern times" and which "incorporates the worship of Odin, Thor and other Norse gods and goddesses." *Id.* at 37. Odinism is a form of Asatru. *Id.* Christian Identity, in turn, "is a racist and anti-Semitic religious sect whose members believe that whites are the descendants of the Lost Tribes of Israel and are God's chosen people; many also believe that Jews are descended from Satan." *Id.* at 26. Christian Identity includes such racist groups as Aryan Nations. *Id.* at 35.

These white supremacist groups are well aware of the accommodations made for religious adherents and actively seek to exploit them. In one Christian Identity newsletter, for example, inmates were advised as follows:

> 'You are not compromising your faith or your race [] by setting the services up on an established framework or constitution . . . or an established fundamentalist Christian denomination recognized by prison officials . . . Obtain a list and choose the most appropriate one, and study their organization. Then, when worship begins, the . . . Israel message may be gradually introduced and no red flags will pop up. If any minorities attended at the outset, they'll soon leave out of boredom. The Holy Bible is the Life Manual of the white race!'

Dangerous Convictions, *supra*, at 34.

In addition to using literature for recruitment and training, white supremacist groups also use "religious" symbols for identification purposes. "Thor's hammer" is an

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[3] Available at http://www.adl.org/learn/Ext_terr/Dangerous_Convictions.pdf.

example of a gang symbol used by Asatru/Odinists. *See* Dangerous Convictions, *supra*, at 39. Such "identifiers" are used to indicate gang affiliation, to "build unity and cohesiveness," and to "identify each other for purposes of violent altercations." Affidavit Of Matthew Meyer at ¶¶ 12-14 (Jt. App. 233-234).

Not surprisingly, correctional institutions "have struggled with the issue of political and ideological groups, including hate groups, masquerading as religious organizations." Developments, *supra*, at 1903-1904. Nonetheless, despite concern regarding the adoption by white supremacist groups of pagan religions such as Odinism and Asatru, "these groups have gained wide acceptance as prison religious communities, and most states permit them to function at some level." *Id.* at 1903-1904; *see also* Dangerous Convictions, *supra*, at 39.

As the U.S. Department of Justice has concluded, "[p]rison systems throughout the world have been and continue to be breeding grounds for radicalism, recruiting grounds for extremist movements, and facilities for the planning and training of radical activities." Review, *supra*, at 6.

III. The Least Restrictive Means Test Greatly Exacerbates The Abuse Of Religious Accommodations.

RLUIPA, like RFRA before it, imposes a least restrictive means test on corrections administrators. The least restrictive means test has greatly exacerbated gang members' abuse of religious accommodations in three ways: (1) it has promoted the proliferation of various religions, including numerous pagan "religions" dominated by white supremacists, such as Odinism and Asatru; (2) it has caused the number of inmate "religious" demands to skyrocket,

creating an excessive burden on correctional chaplains and officials, and often causing a reduction in the provision of religious services to inmates; and (3) it has caused an excessive entanglement of corrections officials with religion by forcing those officials to scrutinize closely every claimed "religion" and every request for "religious" accommodation.

A. The Least Restrictive Means Test Promotes Religion.

Prior to enactment, one concern about RFRA was "that inmates would learn to create 'religions' just to obtain special benefits or to avoid certain prison regulations." Frey, *supra*, at 765. This is, in fact, what happened. In 1996, the Florida Attorney General's Office conducted a survey of state and territorial correctional institutions regarding the impact of RFRA. *See* Tucker, *supra* (Jt. App. 207). The survey revealed that the "enactment of RFRA has resulted in the proliferation of claims for exemptions from prison security regulations and requests for special privileges, grounded in obscure or previously little-known 'religions', including: Wicca, Satanism, Odinism, Asartu, and Luciferianism." (Jt. App. 210).

One recent survey of state correctional officials determined that the "average number of religious groups listed by state correctional departments is approximately twenty." Developments, *supra*, at 1900; *see also id.* at 1896 n.28 (listing thirty-three states surveyed). "Of the states surveyed, Texas lists by far the largest number of faith groups, with 144 distinct religious classifications." *Id.* at 1900. By way of example, the State of Washington recognizes the following twenty-three religions: Astara (Asatru), Buddhism, Church of Christ Scientist, Church of Jesus Christ Christian (Aryan Nation), Hindu, Islam, Jehovah's Witness, Judaism, International Society for Krishna Consciousness, Latter-Day Saints, Moorish Science,

Nation of Islam, Native American, Native American Church, Odinism, Protestant, Rastafarian, Roman Catholic, Seventh Day Adventist, Seventh Day Church of God, Sikh, Unity, and Wicca. *Id.* at 1900 n.48.

As noted previously, several of these "religions" are, in fact, closely identified with white supremacist groups, and are present in the Ohio correctional institutions overseen by respondents in this matter. Affidavit Of Matthew Meyer at ¶¶ 5-6, 9-10 (Jt. App. 231-233). The RLUIPA/RFRA least restrictive means test has undoubtedly been a strong force promoting the proliferation of these "religions."

B. The Least Restrictive Means Test Has Caused An Explosion In Inmate "Religious" Demands.

Imposition of the least restrictive means test has also caused an explosion in inmate "religious" demands. This has greatly burdened corrections officials charged with the provision of religious services, and ironically resulted in a reduction in the ability of those officials to provide religious services to inmates. The 1996 survey conducted by the Florida Attorney General's Office revealed that, after enactment of RFRA, "there has been a tremendous increase in the number of lawsuits and internal demands for 'religiously motivated' alterations of prison practices, creating significant burdens on the resources of corrections systems, state attorneys general, and the courts." Tucker, *supra* (Jt. App. 210).

Again, the experience of the Ohio Department of Rehabilitation and Correction ("ODRC") is consistent with this finding. David Schwarz is the former Religious Services Administrator for the South Region of ODRC. Affidavit Of David Schwarz at ¶ 1 (Jt. App. 199). In that position, Mr. Schwarz oversaw the delivery of religious services and

operational issues involving religious matters. *Id.* His duties included "developing new religious programming, recruiting paid staff and volunteers for the delivery of religious services and acting as a liaison between O.D.R.C. and the religious community at large." *Id.*

Prior to enactment of RFRA, Mr. Schwarz "spent little time on litigation related issues." Affidavit Of David Schwarz at ¶ 3 (Jt. App. 200). After enactment of RFRA, however, Mr. Schwarz was required to spend "between fifteen and twenty percent of [his] time working with the Office of the Ohio Attorney General in connection with lawsuits filed under R.F.R.A." and "between sixty to seventy percent of [his] time working with institutional staff to determine how to comply with R.F.R.A." *Id.* at ¶¶ 3-4 (Jt. App. 199-200). This resulted in "a very significant reduction in the amount of time spent on actually facilitating the delivery of religious services." *Id.* at ¶ 5 (Jt. App. 200). This problem did not affect Mr. Schwarz alone. All religious services personnel were forced to spend more time dealing with RFRA issues, and less time actually providing religious services to inmates. *Id.* at ¶¶ 8-10 (Jt. App. 201-202).

C. The Least Restrictive Means Test Causes An Excessive Entanglement With Religion.

The least restrictive means test also causes an excessive entanglement of corrections officials with religion by forcing those officials to scrutinize closely every claimed "religion" and every request for "religious" accommodation. First, as one commentator noted, "[c]orrectional facility officials lack the requisite knowledge of each religious group's practices, norms, and traditions. Without such knowledge, correctional facility officials are not able to effectively determine whether an inmate is a bona-fide member of a religious group." Davis, *supra*, at 777. As a result of the least restrictive means test, religious services

staff are required to investigate "the authenticity and requirements of such 'religions.'" Affidavit Of David Schwarz at ¶ 12 (Jt. App. 202).

Second, as this Court anticipated, the least restrictive means test "distort[s] the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Corrections officials are well aware of this problem. Because of the least restrictive means test, religious services staff expend large amounts of time to "'set up and shoot down' all possible alternatives for dealing with 'religiously' motivated requests for alterations of normal prison operations." Affidavit Of David Schwarz, Exhibit 1 (Jt. App. 204). Failure to do so opens the possibility of judicial second-guessing noted by this Court in *Turner*.

Third, because of the abuse of religious accommodations by gang members, the provision of religious services has, in effect, become a security issue. Corrections officials, however, must still justify every infringement of "religion" under the least restrictive means test. This results in an excessive involvement of corrections officials with every demand for religious accommodation. In ODRC institutions, for example, "a number of white supremacist groups claimed to be pursuing Christian Identity beliefs and the tenants of the Church Of The Creator in an effort to cover their otherwise illicit, and disruptive activities[,]" while other inmates sought to establish "several new 'religions' which purported to require such accommodations as group martial arts classes." Affidavit Of David Schwarz at ¶ 11-12 (Jt. App. 202). Obviously, the "cumulative result of these activities was that religious staff were required to devote significant amounts of time to investigating the legitimacy [sic] these 'religious' groups and their 'religious' claims in

order to assist security staff in dealing with the problems posed by those groups[.]" *Id.* at ¶ 11 (Jt. App. 202).

In sum, this Court has previously recognized that the "evaluation of penological objectives is committed to the considered judgment of prison administrators" and that corrections officials should have the ability "'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration[.]'" *O'Lone v. Estate Of Shabazz*, 482 U.S. 342, 349 (1987). RLUIPA, like RFRA before it, prevents corrections administrators from doing so. The problem of gang violence, along with abuse by gang members of religious accommodations and the corresponding threat to the health and safety of inmates and corrections staff, is one such intractable security problem that should be left to the considered judgment of corrections administrators.

CONCLUSION

For the foregoing reasons, the *amici curiae* urge the Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

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Petitioners,

v.

REGINALD WILKINSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress violated the Establishment Clause by enacting Section 3 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, which precludes states from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to" a state prison or similar facility, unless the imposition of that burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest" (*id.* § 2000cc-1(a)).

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to the preservation of the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has regularly been involved—as a party, as counsel, or as an *amicus curiae*—in church-state cases before this Court and other federal and state courts throughout the nation.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has sought to preserve religious freedom through its defense of both the Free Exercise and Establishment Clauses of the First Amendment. In furtherance of that goal, the ACLU has appeared before this Court in numerous religion cases, both as direct counsel and as *amicus curiae*.[1]

Amici served as active members of a broad coalition of religious, civil-rights, labor, and other organizations that advocated for the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5. Thus,

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

amici have a significant interest in having this Court reject respondents' facial challenge to the constitutionality of Section 3 of RLUIPA, 42 U.S.C. § 2000cc-1.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3 of RLUIPA generally precludes states from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution [such as a prison or state mental hospital], even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc-1(a).[2] States may impose such burdens only if they demonstrate that the imposition of a specific burden is justified by a compelling governmental interest. *Id.* § 2000cc-1(a)(1)-(2). In essence, the statute requires states to accommodate the religious needs of prisoners and other institutionalized persons under circumstances in which such accommodation would not otherwise be legally mandated.[3]

As this Court has explained, the "play in the joints" (*Locke* v. *Davey*, 540 U.S. 712, 124 S. Ct. 1307, 1311 (2004)) between the Religion Clauses allows a limited sphere

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[2] Section 3 of RLUIPA applies only when the relevant program or institution receives federal assistance or affects interstate commerce. See 42 U.S.C. § 2000cc-1(b).

[3] RLUIPA protects the adherent of *any* religion (see 42 U.S.C. §§ 2000cc-3(a), 2000cc-5(7)(A))—which necessarily includes both mainstream and obscure religions, as well as any other deeply held belief system. See *Africa* v. *Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) ("In considering a first amendment claim arising from a non-traditional 'religious' belief or practice, the courts have looked to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'") (citing *Malnak* v. *Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring) (quotation marks and brackets omitted)); see also *Gillette* v. *United States*, 401 U.S. 437, 445-448 (1971).

of permissible governmental accommodation of religion not required by the Free Exercise Clause or barred by the Establishment Clause. *E.g.*, *ibid.*; *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989) ("the scope of accommodations permissible under the Establishment Clause is larger than the scope of accommodations mandated by the Free Exercise Clause"); see also *Yoder* v. *Wisconsin*, 406 U.S. 205, 221 (1972) (urging "preserving doctrinal flexibility" and "a sensible and realistic application" of the Religion Clauses). This Court has also recognized, however, that, "[a]t some point, accommodation may devolve into an unlawful fostering of religion." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 334-335 (1987) (quotation marks omitted).

The portion of RLUIPA that requires state officials to lift unnecessary governmental burdens on the religious exercise of institutionalized persons safely navigates the space between the Scylla and Charybdis that are the First Amendment's Religion Clauses.[4] This is so for the following reasons:

First, RLUIPA simply removes government-imposed burdens on the ability of prisoners and other institutionalized persons to exercise their faiths. These burdens are not only imposed by the government, but are reinforced by the very nature of state penal and mental institutions—in which every aspect of a person's life is controlled by state officials. See, *e.g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (plurality op.) (governmental action is not an impermissible

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[4] See *Thomas* v. *Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) ("By broadly construing both [Religion] Clauses, the Court has * * * narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.").

establishment of religion if it simply "remov[es] a significant state-imposed deterrent to the free exercise of religion"); *Wallace* v. *Jaffree*, 472 U.S. 38, 84 (1985) (O'Connor, J., concurring) (same). Indeed, the driving force behind RLUIPA was evidence that prisoners, detainees, and institutionalized mental-health patients faced substantial state-imposed burdens in practicing their religious faiths that non-institutionalized persons do not encounter. See Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01 (daily ed. July 27, 2000).

Second, RLUIPA does not authorize states to provide any form of financial aid or sponsorship to religious organizations. See, *e.g.*, *Yoder*, 406 U.S. at 234 n.22 ("sponsorship" and "financial support" of religion are core Establishment Clause prohibitions); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970) (same). Rather, states must bear only whatever expenses may be incurred in removing government-imposed burdens on religion. This factor helps "to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

Third, in requiring states to lift government-imposed burdens on religious exercise, RLUIPA does not authorize states to grant accommodations that would impose substantial burdens on important rights or interests of third parties. *Texas Monthly*, 489 U.S. at 15 (a permissible, but not required, accommodation of religion cannot "burden[] non-beneficiaries markedly"); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709-710 (1985).

Fourth, the statute does not create incentives for prisoners and other institutionalized persons to become religious or to change their religious beliefs or practices. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 231-232 (1997). Nor does the statute favor any religion over another. See, *e.g.*, *Bd. of*

Educ. of Kiryas Joel Village Sch. Dist. v. *Grumet*, 512 U.S. 687, 706-707 (1994); *id.* at 714-715 (O'Connor, J., concurring).

Together, these considerations lead the *amici curiae*—organizations that are well known to be vigilant about potential infringements of the religious liberty and church-state separation guaranteed by the First Amendment—to conclude that Section 3 of RLUIPA is not facially unconstitutional. While the constitutionality of a government-provided religious accommodation necessarily depends on many factors (see *id.* at 720 (O'Connor, J., concurring) (the Establishment Clause "cannot easily be reduced to a single test")), each of the four principles just enumerated has been significant in this Court's evaluation of religious accommodations. Section 3 of RLUIPA comports with these principles and should therefore be upheld against facial attack.

ARGUMENT

SECTION 3 OF RLUIPA IS A FACIALLY CONSTITUTIONAL ACCOMMODATION OF RELIGION.

Given the unique context in which Section 3 of RLUIPA requires the accommodation of religious activity, and the carefully cabined requirements that it places on states, respondents' facial constitutional attack on the statute must fail.

A. Section 3 Of RLUIPA Mandates Nothing More Than The Removal Of Substantial Government-Imposed Burdens On Religious Exercise.

Section 3 of RLUIPA does not allow states to employ their metaphorical thumbs to bias individuals' religious choices; it merely requires states to *remove* those fingers from the scale—thus allowing prisoners and other institutionalized persons to practice their religions more readily. Rather than authorizing or permitting states to encourage re-

ligious exercise, RLUIPA simply requires them not to *discourage* it.

1. In order to be an "accommodation" of religion, the governmental action in question must lift an identifiable government-imposed burden on free-exercise rights. See, *e.g.*, *Kiryas Joel*, 512 U.S. at 705 (government need not "be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"); *County of Allegheny*, 492 U.S. at 601 n.51 ("[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion"); *Texas Monthly*, 489 U.S. at 15 (plurality op.) (accommodation must "remov[e] a significant state-imposed deterrent to the free exercise of religion"); *Wallace*, 472 U.S. at 84 (O'Connor, J., concurring) (an accommodation must lift a "state-imposed burden on the exercise of religion").

The line between a program that appropriately lifts a government-imposed burden on religious exercise and one that inappropriately provides governmental encouragement of religion requires careful policing. But as a general matter, instances in which the government simply lifts a burden of its own creation are much less likely to "advanc[e] religion" (*Amos*, 483 U.S. at 348 (O'Connor, J., concurring)), and therefore generally raise fewer red flags than other forms of governmental action that touch on religious exercise. Thus, an objective observer should perceive most actions that merely remove government-imposed burdens on religious exercise "as an *accommodation* of the exercise of religion rather than as a Government *endorsement* of religion." *Id.* at 349 (O'Connor, J., concurring) (emphasis added); see also, *e.g.*, *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring).

2. There can be no serious doubt that the rules governing conduct in prisons and similar state institutions can pose substantial obstacles to the ability of prisoners and other institutionalized persons to practice their religion. The very es-

sence of imprisonment is governmental restriction on personal liberty. See *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001) ("[f]reedom from imprisonment—from government custody, detention, or other forms of physical constraints—lies at the heart of * * * liberty"). Almost every aspect of a prisoner's life is subject to round-the-clock control by the government. As one court ably explained, prison is a "complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings * * * from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others." *Morales* v. *Schmidt*, 340 F. Supp. 544, 550 (W.D. Wis. 1972).

This total control over all aspects of the lives of prisoners and other institutionalized persons can substantially interfere with their ability to practice their religious faiths. See Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7775 ("[i]nstitutional residents' rights to practice their faith is at the mercy of those running the institutions"). Examples of such interference abound.[5] The government fre-

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[5] See, *e.g.*, *Charles* v. *Verhagen*, 348 F.3d 601, 605 (7th Cir. 2003) (Muslim prisoner prohibited from possessing prayer oil necessary for ritual cleansing before prayer); *Rich* v. *Woodford*, 210 F.3d 961, 962 (9th Cir. 2000) (dissent from denial of rehearing en banc) (officials refused to allow Native American death-row prisoner to participate in pre-execution sweat-lodge ceremony, which prisoner believed would "purify[] his body, mind, and soul" and "make amends for the people he harmed on Earth," thus "prepar[ing] him to cross over from this world to the next"); *Young* v. *Lane*, 922 F.2d 370, 375-376 (7th Cir. 1991) (upholding prison regulation that restricted wearing of yarmulkes); *Hunafa* v. *Murphy*, 907 F.2d 46, 48 (7th Cir. 1990) (noting instances where Jewish and Muslim prisoners are served pork and, as a result, go hungry); *Coronel* v. *Paul*, 316 F. Supp. 2d 868, 880 (D. Ariz. 2004) (prison prevented Dianic-pagan prisoner from attending

quently requires incarcerated individuals to choose between acting in a manner contrary to their religious beliefs and suffering government-imposed penalties.[6]

3. Because the government-imposed burdens on religious rights that exist in prison and other state institutions lack any obvious parallel in the civilian world, it is useful to look to the ways that this Court and Congress have addressed religious liberties in analogous contexts, the most notable of which is the military.[7] It is well established that Congress has significant latitude to remove from members of the Armed Forces burdens on the exercise of religion—even if those burdens do not rise to the level of Free Exercise Clause violations.

For example, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), and Congress's response to it provide a ready exam-

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ceremonies of fellow pagan practitioners). See generally Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7775 ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.").

[6] This dilemma is similar to those faced by the conscientious objectors in *Gillette*, who resisted the draft—risking criminal conviction—because they opposed war (see 401 U.S. at 445), and by a Jewish military officer in *Goldman* v. *Weinberger*, 475 U.S. 503, 505 (1986), who violated the Air Force's then-existing dress code by wearing a yarmulke and, as a result, received a formal letter of reprimand and faced a potential court martial. In both instances, this Court held or suggested that statutory exemptions from the general laws or rules at issue would be constitutional. See *Gillette*, 401 U.S. at 447; note 8, *infra*.

[7] Like prisoners and other institutionalized persons, the men and women in our Armed Forces lack the individual autonomy and freedom enjoyed by civilians. See *Goldman*, 475 U.S. at 507. Indeed, "the military is, by necessity, a specialized society separate from civilian society." *Id.* at 506 (quotation marks omitted).

ple of the "play in the joints" (*Locke*, 124 S. Ct. at 1311) between the Free Exercise and Establishment Clauses that exists in government-controlled environments. In *Goldman*, this Court held that the Free Exercise Clause did not *require* the Air Force to create an exception to generally applicable military-dress policies to allow a Jewish officer to wear a yarmulke. 475 U.S. at 513. But the Air Force's prohibition against non-military headgear was nevertheless a significant burden on Mr. Goldman's religious rights, and this Court's holding in *Goldman* did not suggest otherwise. Thus, after this Court decided *Goldman*, Congress enacted a statute requiring the military to remove the burden by generally allowing members of the Armed Forces to wear items of religious apparel. See 10 U.S.C. § 774; Dwight H. Sullivan, *The Congressional Response to* Goldman v. Weinberger, 121 MIL. L. REV. 125 (1988). There has been no serious suggestion that the lifting of the burden violated the Establishment Clause.[8]

Similar considerations have been used to justify, in certain circumstances, government-funded chaplains in the military and in prisons. Courts have viewed such programs as the government lifting a burden of its own making from individuals under its control who have been "cut off by the State from all civilian opportunities for public communion." *Sch. Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring); see, *e.g.*, *Katcoff* v. *Marsh*, 755 F.2d 223 (2d Cir. 1985). Accordingly, it has been posited that funding the chaplains "may be * * * sustained on constitutional grounds as necessary to secure the members of the

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[8] See *Texas Monthly*, 489 U.S. at 18 n.8 (plurality op.) ("if the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, that exemption presumably would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause") (citation omitted).

Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, * * * government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be." *Schempp*, 374 U.S. at 297-298 (Brennan, J., concurring). And hence, recognizing that the military must send its soldiers "to areas of the world where religion of their own denominations is not available to them," lower courts have upheld the constitutionality of chaplaincy programs insofar as they eliminate that special burden on service-members' practice of their religion. *Katcoff*, 755 F.2d at 234. Because the military has "uprooted the soldiers from their natural habitats[,] it owes them a duty to satisfy their Free Exercise rights." *Id.* at 228.[9]

Thus, a governmental action that removes a burden on religious exercise that would not exist *but for* the exceptional nature of these government-controlled communities could very well violate the Establishment Clause if recreated in the "outside" world. See *Schempp*, 374 U.S. at 297-298 (Brennan, J., concurring); *Developments in the Law—In the Belly*

[9] Specific chaplaincy programs may, however, violate the Establishment Clause by, for example, employing chaplains who proselytize or attempt to indoctrinate their subjects. *E.g.*, *Montano* v. *Hedgepeth*, 120 F.3d 844, 850 n.10 (8th Cir. 1997) ("[h]aving made religious leaders available to inmates, however, a state cannot advance religion through indoctrination * * * or even encourage inmates' attendance at religious services") (citations and quotation marks omitted); *Katcoff*, 755 F.2d at 228 (noting that "[n]o chaplain is authorized to proselytize soldiers or their families"); cf. *Baz* v. *Walters*, 782 F.2d 701, 709 (7th Cir. 1986) (public veterans' hospital "must ensure" that its chaplains do not "proselytiz[e] upon a captive audience of patients"). Chaplaincy programs also present the risk of discrimination against minority religions and of inappropriate pressure being placed on soldiers by commanding officers.

of the Whale: Religious Practice in Prison, 115 HARV. L. REV. 1891, 1899 (2002) ("*Religious Practice in Prison*") ("Religious accommodations in prison * * * differ significantly from those of the outside world."). All that the government is doing in these instances is leveling the playing field by removing a burden of its own creation, rather than inappropriately encouraging religion.

4. Given this background, it is clear that Section 3 of RLUIPA avoids constitutional problems in that prisons and similar state institutions are the quintessential example of a setting in which substantial government-imposed burdens on religion give rise to a concomitant need for accommodations.

For starters, the statute is limited to state-run institutions such as prisons, mental hospitals, and juvenile-detention facilities. See 42 U.S.C. § 2000cc-1(a); 42 U.S.C. § 1997. These government-dominated worlds, like the military, lack parallel in the civilian community. Among other things, "[i]n prison, virtually *any* religious observance requires some governmental involvement—at the very least, a departure from otherwise applicable policies." *Religious Practice in Prison*, 115 HARV. L. REV. at 1892 (emphasis added). But prisoners and other institutionalized persons do not lose their constitutional right to the "free exercise [of religion]" (U.S. CONST. amend. I) in its entirety upon confinement. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 555-556 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."). Thus, the government *necessarily* should take action to allow religious exercise in these special environments.

Furthermore, even within these facilities the statute merely requires states to alleviate "burden[s]" on religious exercise (42 U.S.C. § 2000cc-1(a)), and does not permit—much less mandate—governmental encouragement of religion. As with Congress's legislative response to this Court's holding in *Goldman*, all Congress has mandated in this in-

stance is that states must grant to prisoners and other institutionalized persons religious freedoms closer to those that such persons would have were they not under governmental control. Because of the special nature and severity of the burdens on religious life in state prisons and similar institutions, the statute's requirement that states ameliorate these burdens should not be perceived by objective observers to be anything other than an appropriate accommodation of religion.

B. Section 3 Of RLUIPA Does Not Authorize Financial Aid To, Or Sponsorship Of, Religious Organizations.

Section 3 of RLUIPA was carefully crafted to avoid Establishment Clause problems in another way, as well: While states may be required to make minor expenditures to alleviate burdens on the religious exercise of prisoners and other institutionalized persons, nothing in the statute authorizes states to provide any form of direct financial assistance to religious organizations.

Direct money grants from the government to religious institutions pose a considerable threat to core Establishment Clause principles. *E.g.*, *Mitchell* v. *Helms*, 530 U.S. 793, 855-856 (2000) (O'Connor, J., concurring) ("direct money grants * * * fall[] precariously close to the original object of the Establishment Clause's prohibition"); *id.* at 890-891 (Souter, J., dissenting) ("from the start we have understood the Constitution to bar outright money grants of aid to religion"); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842 (1995) ("we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions").

Section 3 of RLUIPA mandates no such aid, and none of the obvious examples of the sorts of accommodations that might be necessary because of the statute involve payments

to religious organizations. Rather, the following are typical of the sorts of accommodations that RLUIPA might compel:

- A prison or mental institution might be required to allow a prisoner or other institutionalized person to wear a yarmulke, cross, or veil; to grow a beard; or to keep prayer oil—despite otherwise-applicable rules precluding such items.
- A prison might be required to create a schedule for a prisoner who works in a prison job under which the prisoner is not required to work on a day of the week that the prisoner's religion designates to be a day of rest.
- A prison might be required to provide food to prisoners that complies with the dictates of those prisoners' religion, such as a no-pork or Halal diet for Muslims, Kosher food for Jews, a vegetarian diet for many Hindus, or a diet without meat on Fridays for certain Christians.
- A prison might be required to allow prisoners to gather once a week—assuming security concerns can be addressed adequately—to engage in religious services.
- A prison might be required to allow prisoners to meet periodically with clergy of their religious sect.

Critically, none of these forms of accommodation involves direct financial support to a religious organization—and most require no expenditure of any kind. In this way, RLUIPA is decidedly unlike programs that this Court has held to be unconstitutional, such as the direct money grants that New York once provided to religious schools for maintenance and repair expenses. See *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 779-780 (1973); see also *Rosenberger*, 515 U.S. at 842 (recognizing "special Establishment Clause dangers where the government makes

direct money payments to sectarian institutions"); cf. *Agostini*, 521 U.S. at 226-228 (upholding program allowing public-school teachers to provide instruction to eligible students on parochial-school premises in part because no funds reached religious schools' coffers).

Of course, even certain kinds of *indirect* support for religion that may be constitutional within prison walls would likely be unconstitutional if implemented outside the prison context. But worries about apparent state sponsorship of religion are mitigated in this case by the special nature of the institutions governed by Section 3 of RLUIPA.[10]

Finally, it is important to note that, in reality, the financial burden of RLUIPA falls largely on the prisoners and other institutionalized persons seeking accommodations, not on the state. For example, although Section 3 of RLUIPA generally has been interpreted to require prisons to allow prisoners to *possess* various religious texts and materials (see, *e.g.*, *Charles* v. *Verhagen*, 348 F.3d 601, 605 (7th Cir. 2003) (overturning prison prohibition against possession of prayer oil)), those prisons cannot be compelled, and, indeed, may not *purchase* devotional items for the prisoners. See *Religious Practice in Prison*, 115 HARV. L. REV. at 1912 ("Ordering and funding personal ritual property is almost universally an inmate's responsibility * * *."). In fact, states sometimes even pass on to prisoners and other institutionalized persons administrative costs associated with religious

[10] Although prisoners or other institutionalized persons might ask for accommodations constituting direct aid, RLUIPA is not designed for that purpose, and the need to comply with the Establishment Clause—which is a compelling governmental interest—would preclude officials from providing it. See page 17, *infra*. Furthermore, most accommodations claimed under the statute almost certainly *would* be constitutional; those that may not be should be adjudicated in as-applied challenges in light of all relevant facts and circumstances.

accommodations. See, *e.g.*, Ohio Admin. Code § 5120-9-25(G) (2001) ("A new photo shall be taken whenever * * * any significant change in physical appearance has taken place. Rephotographing shall be at the inmate's expense if the change in appearance is occasioned by grooming changes"—which would include, for example, growing facial hair for religious purposes).

Thus, by not requiring—or even permitting—states to provide direct financial support to religious organizations, Section 3 of RLUIPA avoids running afoul of the Establishment Clause's prohibitions against such funding.

C. Section 3 Of RLUIPA Does Not Impose Substantial Burdens On Important Rights or Interests of Third Parties.

Section 3 of RLUIPA also avoids Establishment Clause problems because it does not authorize a state to accommodate the religious needs of prisoners and other institutionalized persons if, in so doing, the state would impose substantial burdens on significant rights or interests of third parties.

It is well established that an accommodation that substantially burdens third parties cannot withstand constitutional scrutiny. See, *e.g.*, *Texas Monthly*, 489 U.S. at 18 n.8 (plurality op.) (approving "legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs"); *Estate of Thornton*, 472 U.S. at 710-711; cf. *United States* v. *Lee*, 455 U.S. 252, 261 (1982) ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.").[11] A state has more latitude to accommodate religious

[11] For example, Connecticut's "Sabbath statute," which "provide[d] Sabbath observers with an absolute and unqualified right not to work on their Sabbath" (*Estate of Thornton*, 472 U.S. at

needs if an accommodation merely lifts substantial government-imposed burdens from some without also burdening others. And hence, a statute that mandates consideration of significant burdens placed on important rights or interests of third parties is substantially more likely to withstand constitutional scrutiny than one that ignores such burdens.

Applying this logic, Section 3 of RLUIPA is, on its face, a constitutionally permissible safeguard for the rights of prisoners and other institutionalized persons in that it does not authorize the states to impose substantial burdens on the important rights or interests of any identifiable group of non-beneficiaries.

1. The Statute Does Not Require Accommodations That Impose Substantial Burdens On Other Institutionalized Persons.

Although Section 3 of RLUIPA normally requires state officials to accommodate the needs of those prisoners and other institutionalized persons whose religious exercise calls for special accommodation, it does not impose substantial burdens on non-religious prisoners or other institutionalized persons, or on those prisoners or other institutionalized persons whose religious needs can be met without special accommodation. Allowing one person to engage in religious activity ordinarily will have no direct effect on anyone else. For example, other prisoners are usually not directly affected by special accommodations under which one prisoner is allowed to wear a cross, another is allowed to eat a special no-pork diet, and a third is allowed to attend weekly Mass.

710-711), violated the Establishment Clause by—in addition to not being designed to lift a government-imposed burden on religion—"plac[ing] an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation." *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987) (describing *Estate of Thornton*'s holding).

To be sure, certain requests for religious accommodations might impose a substantial burden on other prisoners or institutionalized persons. The statute, however, does not preclude state officials from taking into account potential effects on others when devising appropriate accommodations. See *Benning* v. *Georgia*, __ F.3d __, 2004 WL 2749172, at *12 (11th Cir. Dec. 2, 2004); Anne Y. Chiu, *When Prisoners Are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for Their Souls*, 79 WASH. L. REV. 999, 1022-1023 (2004). Under RLUIPA, the state may deny an accommodation if the denial would "further[] a compelling governmental interest" by "the least restrictive means." 42 U.S.C. § 2000cc-1(a). Avoiding substantial burdens on the important rights or interests of other prisoners—because of Establishment Clause concerns or otherwise—may qualify as a compelling governmental interest. See, *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981) ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling."). In such circumstances, RLUIPA does not require an accommodation.[12]

2. The Statute Does Not Require Accommodations That Would Significantly Interfere With The Functioning Of An Institution.

Any concern that religious accommodations under Section 3 of RLUIPA could significantly disrupt the functioning

[12] Because Section 3 of RLUIPA does not automatically require accommodation, any claim that the statute is unconstitutional because it imposes excessive burdens on the important rights and interests of third parties can and should be addressed on an as-applied basis. See note 10, *supra*.

of state institutions is also adequately addressed by the statute.

RLUIPA mandates a balancing test under which states may deny a proposed accommodation of religion if necessary to further a compelling governmental interest. See 42 U.S.C. § 2000cc-1(a). For example, some "institutions have struggled with the issue of political and ideological groups, including hate groups, masquerading as religious organizations." See *Religious Practice in Prison*, 115 HARV. L. REV. at 1903. RLUIPA, however, does not render prison officials powerless against such threats. If a particular prisoner's religious practice would require an accommodation that would threaten security or otherwise significantly disrupt order in an institution, RLUIPA permits authorities to refuse that accommodation. In fact, the sponsors of RLUIPA specifically expressed their belief that courts would "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with considerations of cost and limited resources." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7775.

In any event, the evidence to date suggests that Section 3 of RLUIPA will not excessively disrupt the functioning of state prisons or other institutions. The Federal Bureau of Prisons has long been subject to provisions in the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4, that mirror those in Section 3 of RLUIPA. See 42 U.S.C. § 2000bb-1(a)-(b). Similarly, many states have enacted their own versions of RFRA, which require religious accommodations in state institutions. See Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 44-45 & nn. 81-84 (2000) (detailing state efforts). These statutes have not undermined the institutions' ability to maintain order and safety because—like RLUIPA—they allow the institutions to establish reasonable policies to counter potential abuse or threats to institutional order. Indeed, "[i]n the cases litigated under RFRA, federal correctional officials have continued to prevail the overwhelming majority of the time[, which] * * * suggests that RLUIPA should not hamstring the ability of [state] correctional officials to ensure order and safety in the[ir] prisons." *Madison* v. *Riter*, 355 F.3d 310, 321 (4th Cir. 2003). Accord *Benning*, 2004 WL 2749172, at *12 ("only a small percentage of prisoners' claims [under RFRA] were successful").

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Thus, Section 3 of RLUIPA does not require states to impose substantial burdens on important rights or interests of non-beneficiaries of religious accommodations, a fact that further insulates the statute from facial constitutional challenge under the Establishment Clause.

D. Section 3 Of RLUIPA Does Not Create Incentives For Prisoners And Other Institutionalized Persons To Modify Their Religious Beliefs or Practices.

Finally, Section 3 of RLUIPA avoids constitutional infirmity by not giving prisoners and other institutionalized persons incentives to become religious or to change their religious beliefs or practices.

1. It is axiomatic that a statute or governmental program cannot "give aid recipients any incentive to modify their religious beliefs or practices" or "to undertake religious indoctrination." *Agostini*, 521 U.S. at 231-232; accord *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 650 (2002); *Mitchell*, 530 U.S. at 845 (O'Connor, J., concurring); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993). Section 3 of RLUIPA, on its face, does not create any such illegitimate incentives.

The statute does not on its face encourage prisoners or other institutionalized persons to be religious. Cf. *Agostini*,

521 U.S. at 231-232. Rather, it requires states to remove state-imposed "burdens" on religion, but does not permit states to encourage or give special benefits to religious exercise. See 42 U.S.C. § 2000cc-1(a).

Nor does Section 3 of RLUIPA in any way discriminate *among* religions. See *Kiryas Joel*, 512 U.S. at 706-707 ("whatever the limits of permissible legislative accommodations may be * * * it is clear that neutrality as among religions must be honored"). Under RLUIPA, an adherent of any religion—which necessarily includes both mainstream and obscure religions, as well as any other deeply held belief system (see note 3, *supra*)—is entitled to request an accommodation of that person's religious exercise, and the state must thereafter evaluate the request on neutral grounds. The fact that, in order to practice their respective religious faiths, adherents of different religions may need different accommodations does not suggest governmental bias towards any specific religion. Cf. *Kiryas Joel*, 512 U.S. at 714-715 (O'Connor, J., concurring) ("Accommodations may * * * justify treating those who share [a deeply held] belief differently from those who do not, but they do not justify discrimination based on sect.").

2. Of course, even a statute that does not on its face encourage religion and that is facially neutral among religious sects may still in practice provide an unconstitutional incentive to change one's religious beliefs. And given the realities of prisons—and, in particular, prisoners' understandable desire for anything that breaks the monotony of institutional life—there might well be occasions on which a prisoner's motive for requesting a religious accommodation is insincere. But whether any particular "accommodation" might in fact cross the line and constitute an unconstitutional fostering of religion by encouraging prisoners and other institutionalized persons to be—or pretend to be—religious is merely an implementation issue appropriately left for as-applied challenges to the statute. As a facial matter, the statute simply removes burdens hindering religious exercise; it does not encourage such exercise.

Furthermore, there is no reason to believe that, even as applied, Section 3 of RLUIPA will unlawfully encourage religiosity or the practice of specific religions. Nothing in the statute prevents states from inquiring into the *sincerity* of the religious beliefs of a prisoner or other institutionalized person. See *Religious Practice in Prison*, 115 HARV. L. REV. at 1901-1909 (discussing state and federal policies designed to detect and deter insincere requests by prisoners for religious accommodations). Although RLUIPA bars inquiries into whether a particular belief or practice is "central" to a prisoner's religion (see 42 U.S.C. § 2000cc-5(7)(A); see also *Employment Div.* v. *Smith*, 494 U.S. 872, 886-887 (1990) (recognizing inappropriateness of judges assessing the centrality of a practice to an individual's religious beliefs)), the statute does not preclude inquiries into the *genuineness* of a prisoner's avowed religiosity—an inquiry that the courts routinely undertake in a range of Religion Clause cases.[13] Therefore, there is no reason to presume that, in practice, Section 3 of RLUIPA is likely to encourage religious changes of heart.

* * * * *

Thus, the fact that Section 3 of RLUIPA does not on its face provide an incentive for prisoners and other institutionalized persons to change their religious convictions is another

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[13] See, *e.g.*, *Gillette*, 401 U.S. at 457 ("[T]he truth of a belief is not open to question; rather, the question is whether the objector's beliefs are truly held.") (quotation marks omitted); *United States* v. *Seeger*, 380 U.S. 163, 165-166 (1965) ("[T]he test of belief 'in a relation to a Supreme Being' is whether a given belief that is *sincere* and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God * * *.") (emphasis added).

consideration that saves the statute from infirmity under the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and hold that Section 3 of RLUIPA is facially constitutional.

Respectfully submitted.

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JON B. CUTTER, *et al.*,

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to the United States Court of Appeals
For the Sixth Circuit

Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents

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QUESTION PRESENTED

1. Whether Congress exceeded its constitutional powers when it mandated, via the Religious Land Use and Institutionalized Persons Act of 2000, broad religious accommodations for state prisoners as a condition on federal spending for local, as opposed to general or national, prison systems?

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No. 03-9877

In The

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Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Respondents

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent author-

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

ity in our national life," including the principles, at issue in this case, that the Establishment Clause does not prohibit the federal government from accommodating the religious beliefs of its citizens but that the Spending Clause limits federal spending to matters of national or general concern as opposed to purely local concern. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute and its affiliated scholars have published a number of books and monographs of particular relevance here, including John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001); HARRY V. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (1965); HARRY V. JAFFA, CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY (1999); WILLIAM J. BENNETT, OUR SACRED HONOR (1997); Larry P. Arnn and Douglas A. Jeffrey, *"We Pledge Allegiance"—American Christians and Patriotic Citizenship*; DANIEL C. PALM, ED., ON FAITH AND FREE GOVERNMENT (1997); and John C. Eastman, *"We Are A Religious People Whose Institutions Presuppose A Supreme Being,"* 5 NEXUS: J. OPINION 13 (Fall 2000).

The Claremont Institute Center for Constitutional Jurisprudence, which is the public interest law unit of the Institute, has participated as *amicus curiae* before this Court in several cases addressing similar issues, including *Van Orden* v. *Perry*, No. 03-1500 (U.S., pending); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S.Ct. 2301 (2004); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Schaffer* v. *O'Neill*, 534 U.S. 992 (2001); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

STATEMENT OF THE CASE

The three appellants are prisoners in the state of Ohio. They contended, *inter alia*, that various officials with the Ohio Department of Rehabilitation ("Ohio") violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5. *Cutter* v. *Wilkinson*, 349 F.3d 257, 259 (CA6 2003). Ohio's motion to dismiss on grounds that the RLUIPA provisions dealing with institutionalized persons were facially unconstitutional as exceeding Congress's Spending Clause authority and contravening the Establishment Clause, was denied by the District Court. *Id.*, at 261. On interlocutory appeal, the Sixth Circuit held that RLUIPA's institutionalized persons provisions were facially unconstitutional under the Establishment Clause because RLUIPA's purpose was to "advance religion in prisons relative to other constitutionally protected conduct" and because RLUIPA had the effect of advancing religion by inducing prisoners will become religious in order to benefit from the stricter standard of review mandated by RLUIPA. *Id.*, at 264-65. The court acknowledged but did not reach Ohio's Spending Clause contention. *Id.*, at 259, 269.

SUMMARY OF ARGUMENT

The holding below that RLUIPA amounts to an unconstitutional Establishment of religion cannot be squared with this Court's religious accommodation jurisprudence. But Ohio's alternate contention below, that the institutionalized persons provisions of RLUIPA exceeded Congress's authority under the Spending Clause, has merit.

Following *United States* v. *Lopez*, 514 U.S. 549 (1995), in which this Court resurrected some of the limits on Congress's Commerce Clause power that were critical to the Founders' constitutional design, the Spending Clause appears to have become Congress's new regulatory vehicle of choice because of the overly broad interpretation of the Clause that

has been sanctioned by this Court. In the New Deal-era case of *United States* v. *Butler*, 297 U.S. 1, 66 (1936), this Court embraced an interpretation of the Spending Clause that affords to Congress almost unlimited power to spend taxpayer monies on whatever it deems beneficial. And in *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court sanctioned an equally broad assertion of power by Congress to attach conditions on its spending programs in order to regulate beyond what its enumerated powers would otherwise permit. As a result, Madison's prophetic warning of a Government "without any limits at all" has come to pass, and we see daily a ubiquitous Federal government enacting, under the guise of the Spending Clause, laws and regulations in areas that the Constitution left to each State's innate police powers. If left unchecked, the expansive claims of power that have been asserted by Congress under the Spending Clause will render this Court's landmark decision in *Lopez* a nullity. This case affords an opportunity for this Court to begin to re-think the expansive and erroneous interpretation of the Spending Clause first suggested in *Butler*.

ARGUMENT

I. RLUIPA's Accommodation of Prisoners' Exercise of Religion Does Not Violate The Establishment Clause.

This *amicus curiae* agrees with the contention of Petitioners and their *amici* that RLUIPA does not violate the Establishment Clause. It is both well-settled and correct as an original matter that the government does not violate the Establishment Clause when it merely accommodates the religious faith of its citizens. *See, e.g., Corporation of Presiding Bishops of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (holding that applying religious exemption to Title VII's prohibition against religious discrimination in employment to secular nonprofit activities of religious organization did not violate the Establishment Clause.); *Walz v. Tax Commission of of City of New York*, 397 U.S. 664, 673

(1970) (holding that New York's exempting of real property tax realty owned by religious organization did not establish religion, it "simply spar[ed] the exercise of religion from the burden of property taxation levied on private profit institutions"). The Establishment Clause, even as currently interpreted, allows the "government some latitude in recognizing and accommodating the central role religion plays in our society" because "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *County of Allegheny v. ACLU,* 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

Moreover, religious accommodations, and even overt acknowledgements, were commonplace at the time the First Amendment was drafted and ratified, both at the state and federal level. The first Congress, for example, saw no conflict between the Establishment Clause and the Northwest Ordinance, which served as the charter of government for the territories northwest of the Ohio River (the present states of Ohio, Indiana, Illinois, Michigan and Wisconsin). The Ordinance included the following provision supporting the teaching of religion in public schools: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 50, 51 n. a (July 13, 1787, re-adopted Aug. 7, 1789). Although the ordinance was initially passed in the summer of 1787 before the Constitution itself was adopted and ratified, it was re-adopted by the first Congress—the same Congress that approved the First Amendment and sent it (along with the remainder of the Bill of Rights) to the States for ratification. *Id.* Significantly, Congress changed certain provisions to "adapt the [ordinance] to the present Constitution," *id.*, at 51, but it left the religion clause intact.

Other public pronouncements at the time routinely acknowledged God. In his first official Act as President, for example, George Washington prayed that the "Almighty Being who rules over the universe" would "consecrate" the government formed by the people of the United States. George Washington, *First Inaugural Address* (April 30, 1789), *reprinted in* WILLIAM B. ALLEN, ED., GEORGE WASHINGTON: A COLLECTION 460-61 (1988). And his proclamation of a day of thanksgiving, which we still celebrate, is an elegant national prayer, requested by the very Congress that drafted the Establishment Clause of the First Amendment:

> Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor, and Whereas both Houses of Congress have by their joint Committee requested me "to recommend to the People of the United States a day of public thanks-giving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peaceable to establish a form of government for their safety and happiness.
>
> Now therefore I do recommend and assign Thursday the 26th day of November next to be devoted by the People of these States to the service of that great and glorious Being, who is the beneficient Author of all the good that was, that is, or that will be. That we may then all unite in rendering unto him our sincere and humble thanks, for his kind care and protection of the People of this country previous to their becoming a Nation, for the signal and manifold mercies, and the favorable interpositions of his providence, which we experienced in the course and conclusion of the late ware, for the great degree of tranquility, union, and plenty, which we have since

> enjoyed, for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national One now lately instituted, for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge and in general for all the great and various favors which he hath been pleased to confer upon us.
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech him to pardon our national and other transgressions, to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually, to render our national government a blessing to all the People, by constantly being a government of wise, just and constitutional laws, discreetly and faithfully executed and obeyed, to protect and guide all Sovereigns and Nations (especially such as have shown kindness unto us) and to bless them with good government, peace, and concord. To promote the knowledge and practice of true religion and virtue, and the encrease of science among them and Us, and generally to grant unto all Mankind such a degree of temporal prosperity as he alone knows to be best.

George Washington, *Thanksgiving Proclamation* (Oct. 3, 1789), reprinted in GEORGE WASHINGTON: A COLLECTION, *supra*, at 534-35.

Even Thomas Jefferson, the patron saint of the separation of church and state movement, began the Virginia Statute for Religious Freedom by invoking "Almighty God, "the Holy author of our religion," the "Lord of body and mind." *A Bill for Establishing Religious Freedom*, reprinted in Thomas Jefferson, Writings, 346 (Merrill Peterson, ed., Library of

America 1984). Under today's expanded interpretation of the Establishment Clause, all of these references to God would constitute an unconstitutional establishment of religion by the very people who drafted and ratified the actual Establishment Clause, yet even today's interpretation does not go so far as to prevent government from accommodating the religious free exercise of private citizens.

These founding era public affirmations of God and religion are not at all uncharacteristic or surprising, for the Founders believed that a virtuous citizenry was both a precondition for republican government and a continuing necessity for its perpetuation. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15, *reprinted in* FRANCIS NEWTON THORPE, 7 THE FEDERAL AND STATE CONSTITUTIONS 3812, 3814 (1993) (1909) ("Thorpe"). The Massachusetts Constitution of 1780 echoes the sentiment: "[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality . . . ." Mass. Const. of 1780, Pt. 1, Art. 3, *reprinted in* 3 THORPE 1888, 1889. The Pennsylvania Constitution of 1776 went even further, asserting:

> Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution. And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning . . . shall be encouraged . . . .

Pa. Const. of 1776, Art. II, § 45, *reprinted in* 5 Thorpe 3081, 3091.

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers: "Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another." The Federalist No. 55, at 346 (Clinton Rossiter, ed., 1961).

Although some of the passages just recited speak primarily of virtue and morality rather than religion itself, the fostering of virtue was, for the Founders, a task intimately tied to religion. As President Washington noted in his Farewell Address, "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, *Farewell Address,* reprinted in GEORGE WASHINGTON: A COLLECTION, *supra,* at 521.

In sum, the Founders thought religion and virtue were both necessary to the perpetuation of republican institutions, and that it was the duty of government to foster such religious virtue in the citizenry. The Establishment Clause barred the federal government from providing tax support to one religious sect to the exclusion of all others, or from mandating adherence to such a nationally "established" religion, but it did not prohibit the federal government from providing aid to religion generally, or even from issuing public nonsectarian religious proclamations. Necessarily, then, mere accommodation of private religious exercise was perfectly constitutional.

Supreme Court Justice William O. Douglas acknowledged the Founders' views when, in the 1952 case of *Zorach* v. *Clauson*, he wrote: "We are a religious people, whose institutions presuppose a Supreme Being." 343 U.S. 306, 313 (1952). The very legitimacy of government by consent is based on the self-evident truth articulated in the

based on the self-evident truth articulated in the Declaration of Independence (by Thomas Jefferson, no less) that all men, all human beings, "are *created* equal." Decl. of Independence, para. 2, 1 Stat. 1 (1776) (emphasis added). And the very idea that people have rights that precede and are superior to government is based on the claim in the Declaration of Independence that human beings "are endowed, *by their Creator*, with certain unalienable rights," including the rights to life, liberty, and the pursuit of happiness. *Id.* (emphasis added). This is our national creed, and it is odd indeed that we have interpreted the Establishment Clause to bar government from accommodating those who would follow its lights.

Thus, the better interpretation of the Establishment Clause, one which prevailed throughout most of our nation's history, is that the Government moves from permissible accommodation to impermissible establishment only when it attempts to coerce religious participation or otherwise puts its "weight behind obvious efforts to proselytize on behalf of a particular religion." *Allegheny County*, 505 U.S., at 660-61 (Kennedy, J., concurring in the judgment in part and dissenting in part). As Justice Kennedy noted in *Allegheny County*, barring governmental coercion "goes far toward the attainment of [the] object [of the Establishment Clause]." *Id.*, at 660; *see also Lee* v. *Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*" (emphasis in original)).

Under this original, anti-coercion understanding of the Establishment Clause, it is clear that RLUIPA is a permissible accommodation rather than an impermissible establishment of religion. RLUIPA does not attempt to coerce prisoners into practicing religion; it does not penalize prisoners for not being religious; and it does not put the government's weight behind any effort to proselytize. Rather, it merely

attempts to accommodate prisoners' religious beliefs by ensuring that no government will enact any law that substantially burdens the exercise of a prisoner's religion unless it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). That this heightened scrutiny provides a greater accommodation for religion than is required by the Free Exercise Clause does not turn RLUIPA into an unconstitutional establishment. There is "ample room" between what the Free Exercise Clause mandates and what the Establishment Clause forbids, *Amos*, 483 U.S., at 334, and this accommodation easily fits within that window. Were this Court to hold otherwise, a host of previously-approved accommodations would be unconstitutional establishments. *See, e.g., Amos*, 483 U.S., at 338 (upholding religious exemption in Title VII); *Walz*, 397 U.S., at 673 (upholding state tax exemption for religious organizations); *Zorach*, 343 U.S., at 684 (upholding release time program, noting: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions"); *see also, e.g.*, 21 CFR § 1307.31 (1993) ("The listing of peyote as a controlled substance ... does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church"); 25 CFR § 11.87H (1993) ("[I]t shall not be unlawful for any member of the Native American Church to transport into Navajo country, buy, sell, possess, or use peyote in any form in connection with the religious practices, sacraments or services of the Native American Church"); Dept. of Air Force, Reg. 35-10, ¶ 2- 28(b)(2) (Apr. 1989) ("Religious head coverings are authorized for wear while in uniform when military headgear is not authorized"); National Prohibition Act, § 3, 41 Stat. 308 ("Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported,

exported, delivered, furnished and possessed"), repealed by Liquor Law Repeal and Enforcement Act, § 1, 49 Stat. 872; *see generally*, Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1985); Michael McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

II. The Appropriations to Which RLUIPA Was Attached Exceeded Congress's Power Under the Spending Clause.

Concluding that RLUIPA does not violate the Establishment Clause is not the end of the constitutional inquiry, of course, as Congress must still find authority for RLUIPA's enactment in some enumerated power. Congress enacted RLUIPA ostensibly in reliance on its power to raise taxes "to provide . . . for the general welfare of the United States"—the Spending Clause. U.S. Const. Art 1, § 8, cl. 1. More precisely, Congress enacted RLUIPA as a condition on a previously-enacted *federal* program of spending for *state* prison systems. Accordingly, this Court must first determine whether the federal government's state prison spending program is permissible under the Spending Clause and, if it does, then determine whether RLUIPA meets the test for valid conditions on that spending, established by this Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). For the reasons set out below, RLUIPA does not get over the first hurdle.[2]

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[2] Because Congress has not relied on its authority under Section 5 of the Fourteenth Amendment, we do not address whether RLUIPA would be a permissible exercise of that power, but merely note that widespread erection of barriers by State governments to the free exercise of religion might well suffice under this Court's decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), to sustain RLUIPA pursuant to Congress's Section 5 authority. Nor do we address whether RLUIPA's land use provisions are a valid exercise of Congress's Commerce Clause authority.

A. The Historical Understanding of the Spending Clause.

Article I, Section 8, Clause 1 of the Constitution provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. On its face, the clause allows Congress to levy taxes only for two purposes: 1) to pay the debts of the United States; and 2) to provide for the common defense and general welfare of the United States. Yet to the modern eye, those two purposes are so broad as to amount to no limitation at all. Indeed, the contemporary view is that the power to provide for the "general welfare" grants Congress the ability to spend for anything it views as beneficial in some way, even if beneficial only to a small segment of the population or to a single locale. *See, e.g.*, Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 93 (2001) ("It is hard to imagine a broader statement of the scope of Congress's powers" than the "common defence" and "general welfare" language of the Spending Clause).

Such was not the view of those who drafted and ratified the Constitution, nor the view which prevailed in the political branches of government for the first half century of our nation's history, nor the view which prevailed in this Court until after its New Deal-era decision in *United States* v. *Butler*. Madison and Jefferson, for example, believed that the authority to spend for the "general Welfare" was merely a shorthand permission for Congress to spend taxpayer funds to further the powers enumerated elsewhere in Article I, Section 8. *See, e.g.*, Federalist 41, pp. 263-64 (Madison) (Rossiter, ed., 1961); James Madison, Debate on the Cod Fishery Bill, 3 *Annals of Congress*, House of Representatives, 2nd Congress, 1st Session 386-87 (1792); Thomas Jefferson, Opinion on the Constitutionality of the National Bank, (Feb. 15,

1791), *reprinted in* THOMAS JEFFERSON, WRITINGS 416, 418 (Merrill D. Peterson, ed., Library of America 1984). Even Alexander Hamilton, who adhered to the broader view that the Spending Clause was a separate grant of power unconfined by the other power enumerated in Article I, Section 8, believed the clause authorized spending *only* for the general or national welfare and not for the special welfare of particular regions or states. Alexander Hamilton, Report on Manufactures, Dec. 5, 1791, *reprinted in* 2 FOUNDERS CONSTITUTION 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987).

From 1800 to 1860, almost every President held to the view that the Spending Clause was limited, either by its own text or by the enumeration of powers which followed. In the closing days of his second term as President, for example, Madison vetoed an internal improvements bill that would have funded the construction of roads and canals "in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defence." President James Madison, Veto Message, 32 ANNALS OF CONG. 211 (1817). Madison rejected the contention that the Spending Clause authorized such expenditures, stating that such a broad reading would render "the special and careful enumeration of powers, which follow the clause, nugatory and improper." *Id.*, at 212.

President James Monroe vetoed as unconstitutional a bill to preserve and repair the Cumberland road, noting in his veto message that Congress's power to spend was restricted "to purposes of common defence, and of general, national, not local, or state, benefit." President James Monroe, Veto Message, 46 ANNALS OF CONG. 1838, 1849 (May 1822). President Andrew Jackson vetoed as unconstitutional an effort by Congress to improve navigation of the Wabash River. He conceded that the improvements in the navigable portions of the river qualified as in the "general" or national welfare, but he deemed improvements above the point of navigability

to be an unconstitutional appropriation for local improvements rather than improvements in the general welfare. President Andrew Jackson, Veto Message, 28 H. R. Journal 28 (1834).

Presidents Tyler, Polk and Buchanan likewise vetoed internal improvements bills as an unconstitutional exercise of Congress's power under the Spending Clause. *See, e.g.*, President John Tyler, Veto Message, 39 H.R. Journal 1081 (June 11, 1844). President Buchanan took it as a given that the funds raised by Congress from taxation were "confined to the execution of the enumerated powers delegated to Congress." The idea that the resources of the federal government—either taxes or the public lands—could be diverted to carry into effect any measure of state domestic policy that Congress saw fit to support "would be to confer upon Congress a vast and irresponsible authority, utterly at war with the well-known jealousy of Federal power which prevailed at the formation of the Constitution." "The natural intendment" of those who drafted and ratified the Constitution, he continued,

> would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a Government has been created with all its other powers carefully limited, but without any limitation with respect to the public lands.

President James Buchanan, Veto Message, 55 H.R. Journal 506 (Feb. 26, 1859).

Most of the Founders, and most of the individuals who served in the office of President for the first half century of our nation's history, adhered to the Madisonian view regarding the Spending Clause's limits. But whether the Clause's limits are defined by the subsequent enumeration of powers

(Madison's position), or by the textual requirement that spending be for the "general" or national as opposed to local welfare (Hamilton's position), the view that the spending power was itself limited in some way is the only view compatible with the doctrines of enumerated powers and limited government.

The enumerated powers given to Congress in the rest of Article I, Section 8 were themselves limited to matters that required national rather than local legislation. For example, early in the constitutional convention, Roger Sherman proposed that Congress should have power to legislate "in all cases which may concern the *common interests* of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned." 2 MAX FARRAND, ED., THE RECORDS OF THE FEDERAL CONVENTION 21 (1911), (proposal by Roger Sherman, July 17, 1787) (emphasis added); *see also id.* (proposal of Gunning Bedford) (giving to Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent"). His proposal, and others like it, were referred to the Committee of Detail, which on August 6, 1787 gave substance to his proposal by reporting back a list of enumerated powers that was eventually to become Article I, Section 8—powers designed to further the common interests or general welfare of the nation without interfering unnecessarily with the internal police powers of the states. Thus, the limitations implicit in the very idea of the enumerated powers doctrine paralleled the "general welfare" limitation in the spending clause.

This Court sided with Hamilton in *United States* v. *Butler*, 297 U.S. 1, 66 (1936), of course, holding that "[w]hile . . . the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the legislative powers of the Con-

gress." *Id.*, at 65-66. In other words, though it rejected the long-standing Madisonian position, the Court nevertheless concluded that the "general welfare" clause imposed another limitation on Congress' spending power, namely, that the purpose of the spending "must be 'general, and not local.'" *Id.*, at 66-67; *see also id.*, at 87 (Stone, J., dissenting) ("The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national"). The Court then invalidated the Agricultural Adjustment Act as exceeding that textual limit. *Id.*, at 68.

This Court in *South Dakota* v. *Dole* likewise recognized that "the general welfare" imposes a limitation on the Spending Power, 483 U.S., at 207, but it failed to appreciate that the text permits only spending on national rather than local programs instead of merely requiring that the spending "serve general public purposes." *Id.* The former, and correct, limitation is much more judicially enforceable than the latter, so it is no surprise that this Court, having adopted the latter interpretation, substantially deferred to Congress's judgment. *Id.* Such deference is less appropriate under the limitation actually contained in the text of the Clause. In other words, Justice O'Connor was correct in her dissenting opinion in the case: "If the spending power is to be limited only by Congress' notion of the general welfare, the reality . . . is that the Spending Clause gives 'power to the Congress . . . to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause." 483 U.S., at 217 (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S., at 78). And such deference cannot be squared with this Court's more recent revival of the constitutional limits on Congress's enumerated powers in the analogous context of the Commerce Clause. *See United States* v. *Lopez*, 514 U.S. 549 (1995); *United States* v. *Morrison*; 529 U.S. 598 (2000); and *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159

(2001); *see also Ashcroft* v. *Raich*, 352 F.3d 1222 (CA9 2003), *cert. granted*, 124 S.Ct. 2909 (2004).

B. RLUIPA Exceeds Congress's Spending Clause Power Because the Appropriations to which it is Attached Were for Local, Not National, Prisons.

The spending program to which RLUIPA's conditions regarding institutionalized persons attached is clearly unconstitutional under the Madisonian view of the Spending Clause. *Federal* spending for state and local prisons is simply not among the enumerated powers delegated to Congress.

But even if this Court reaffirms its holding in *Butler* that Hamilton's view of the Spending Clause is the correct one, the federal appropriation to which RLUIPA's institutionalized persons provisions is attached exceeds Congress's Spending Clause power. Funding for state and local prisons is a quintessentially local, as opposed to national, appropriation. State prisons are set up to house those individuals who have committed against the people of the State crimes defined by the Legislature of the State. Housing these prisoners is clearly of primary benefit to the local rather than the national citizenry.

This Court has previously recognized the localized nature of prisons and prisoners. In *Preiser* v. *Rodriguez*, for example, Justice Brennan, writing for the Court, stated that "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." 411 U.S. 475, 491-92 (1973). Justice Brennan's difficulty in *Preiser* undermines any claim that the federal appropriations at issue here designed to further the national as opposed to local welfare.

CONCLUSION

The Establishment Clause reasoning of the Sixth Circuit should be rejected, but the decision of the Sixth Circuit should be affirmed on the alternate ground that the federal appropriation to which RLUIPA's institutionalized persons conditions is attached exceeds Congress's power under the Spending Clause.

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IN THE
Supreme Court of the United States

JON B. CUTTER, ET AL.,
Petitioners,

v.

REGINALD WILKINSON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COALITION FOR THE FREE EXERCISE OF RELIGION

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INTEREST OF THE *AMICUS*

The Coalition for the Free Exercise of Religion is a coalition of over 50 religious and civil liberties organizations. (Coalition members are listed in Appendix A.) These organizations represent almost every major faith group in America, spanning the full spectrum of religious diversity—Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, and Sikhs. The Coalition includes liberals and conservatives (religious and nonreligious), and groups with world views as disparate as People for the American Way and Liberty Counsel. Though the Coalition includes members who often find themselves on opposite sides of Establishment Clause issues, they speak with one voice in the conviction that accommodating religious exercise by removing government-imposed substantial burdens on religious exercise is an essential element of a democratic society. The Coalition's members supported the enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") to achieve this purpose, and now join together to defend its constitutionality. The Coalition takes no position on the merits of the application of RLUIPA to the facts of this case. This brief addresses only the question of whether RLUIPA, on its face, is a constitutionally legitimate exercise of Congressional authority.[1]

SUMMARY OF ARGUMENT

The Establishment Clause theory adopted by the lower court is that legislative accommodations of religious

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[1]All parties have consented to the filing of this brief. A letter of consent from Petitioners Jon B. Cutter *et al.* is on file with the Court. Letters of consent from all other parties have been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and their members made any monetary contributions to the preparation or submission of this brief.

exercise are forbidden if they accommodate only religious exercise.[2] Not only would this theory invalidate thousands of long-standing, non-controversial, legislative accommodations of religious exercise at every level of government, but this anti-accommodation rule is also premised on an extreme view of the Establishment Clause that has never garnered the vote of more than a single Justice of this Court (if that), let alone a majority.[3] Accordingly, it is not surprising that courts addressing this argument consistently reject it in cases challenging both the constitutionality of RLUIPA's prisoner provisions (Section 3)[4] and its land-use provisions (Section 2).[5] Similarly, this anti-accommodation rule was squarely rejected by every court to address the issue when it was raised against RFRA—RLUIPA's broader predecessor—both before and after RFRA was struck down as applied to the states on other grounds in *Boerne*.[6]

Courts so consistently uphold RLUIPA because it satisfies all three requirements of the *Lemon* test: (1) RLUIPA has a secular purpose, to minimize government

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[2]*See Cutter v. Wilkinson*, 349 F.3d 257, 264 (6th Cir. 2003).

[3]It appears that the closest any Justice has ever come to accepting such a theory is Justice Stevens' concurrence in *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring), which was not joined by any other Justice. *See also In re Young*, 141 F.3d 854, 863 (8th Cir. 1998) (rejecting challenge to RFRA for accommodating religious without also accommodating atheists, because challenge "direct[ly] contradict[s] the declaration of a majority of the Supreme Court in" *Amos*).

[4]*See, e.g., Benning v. Georgia*, Nos. 04-10979 & 02-00139, __ F.3d __, 2004 WL 2749172 (11th Cir. Dec. 2, 2004) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges to RLUIPA Section 3); *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (rejecting Establishment Clause challenge to RLUIPA Section 3); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges to RLUIPA Section 3); *Mayweathers v. Newland,* 314 F.3d 1062 (9th Cir. 2002) (rejecting Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges to RLUIPA Section 3), *cert. denied sub nom. Alameida v. Mayweathers,* 124 S.Ct. 66 (2003); *Williams v. Bitner,* 285 F. Supp. 2d. 593 (M.D. Pa. 2003) (rejecting constitutional challenges to RLUIPA Section 3); *Glick v. Norris*, No. 5:03CV00160 (E.D. Ark. Aug. 11, 2004) (same); *Jones v. Toney*, No. 5:02CV00415 (E.D. Ark. Mar. 29, 2004) (same); *Sanabria v. Brown*, No. 99-4699 (D.N.J. June 5, 2003) (same); *Gordon v. Pepe,* No. 00-10453, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (same); *Johnson v. Martin*, 223 F. Supp. 2d 820 (W.D. Mich. 2002) (same), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002) (same), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Taylor v. Cockrell*, No. H-00-2809 (S.D. Tex. Sept. 25, 2002) (rejecting constitutional challenge to RLUIPA Section 3), *vacated on other grounds, Taylor v. Groom*, No. 02-21316 (5th Cir. Aug. 26, 2003); *Love v. Evans*, No. 2:00-CV-91 (E.D. Ark. Aug. 8, 2001) (same); *Mayweathers v. Terhune*, 2001 WL 804140, (E.D. Cal. 2001) (same).

[5]*See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (rejecting Establishment Clause challenge to RLUIPA Section 2); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004) (rejecting constitutional challenges to RLUIPA Section 2); *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003) (same); *Murphy v. New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (same); *Westchester Day Sch. v. Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003) (same); *Guru Nanak Sikh Soc'y v. County of Sutter*, 326 F. Supp. 2d 1140 (E.D. Cal. 2003) (same); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT (D. Ariz. Mar. 26, 2003) (same); *Christ Universal Mission Church v. Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917 (N.D. Ill. Sept. 11, 2002) (same) *vacated on other grounds* 2004 WL 595392 (7th Cir. Mar. 26, 2004); *Freedom Baptist Church v. Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (same). *See also Cottonwood Christian Ctr. v. Cypress*, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) (RLUIPA "appear[s] to . . . be within Congress's constitutional authority").

[6]*See, e.g., In re Young*, 141 F.3d at 863 ("RFRA fulfills each of the elements presented in the *Lemon* test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA."); *Mockaitis v. Harcleroad,* 104 F.3d 1522, 1530 (9th Cir.) (same), *vacated on other grounds*, 521 U.S. 507 (1997); *Sasnett v. Sullivan,* 91 F.3d 1018, 1022 (7th Cir. 1996) (same) *vacated on other grounds*, 521 U.S. 1114 (1997); *E.E.O.C. v. Catholic Univ. of America,* 83 F.3d 455, 470 (D.C. Cir. 1996) (same); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (same), *rev'd on other grounds*, 521 U.S. 507 (1997); *Jama v. United States*, Nos. 97-3093 & 98-1282, __ F. Supp. 2d __, 2004 WL 2538275, *25 (D.N.J. Nov. 10, 2004) (same).

interference with religious exercise; (2) it does not have the primary effect of advancing religion, because alleviating substantial government burdens on religious exercise—even exclusively, as religious accommodation laws do—does not involve the government *itself* advancing religion; (3) and the statute entails no greater entanglement problem than the ordinary application of Free Exercise doctrine. *See Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

In short, RLUIPA, like so many other statutes accommodating religious exercise, fits comfortably within the "ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (internal quotation omitted). Indeed, such accommodations "follow[] the best of our traditions" by relieving substantial regulatory burdens on religious exercise. *Zorach v. Clauson,* 343 U.S. 306, 314 (1952).

Finally, if the Court chooses to reach the Spending and Commerce Clause challenges not addressed by the lower court, it should reject those challenges as well.

ARGUMENT

I. RLUIPA Section 3 Is Consistent with the Establishment Clause.

A. RLUIPA Has a Secular Purpose.

RLUIPA was passed for the secular government purpose of "protect[ing] the free exercise of religion from unnecessary government interference." 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); *Madison*, 355 F.3d at 317. As this Court made clear in *Amos*, it is a "*proper purpose* [to] lift[] a regulation

that burdens the exercise of religion." *Amos*, 483 U.S. at 338 (emphasis added); *id.* at 339 (noting the "permissible purpose of limiting governmental interference with the exercise of religion"). Indeed, it has been a consistent refrain of this Court's Establishment Clause jurisprudence that it is a permissible government purpose to limit government interference with the exercise of religion.[7]

These cases simply emphasize this Court's admonition that the requirement of a secular purpose "does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." *Amos*, 483 U.S. at 335 (internal quotation omitted). Thus, "the government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause." *Id.*, 483 U.S. at 334. *See also Zorach*, 343 U.S. at 314 (accommodating religious exercise "respects the religious nature of our people and accommodates the public service to their spiritual needs").

Indeed, legislation like RLUIPA that has the permissible purpose of lifting burdens on religious exercise is all the more common—and necessary—since the Supreme Court's decision in *Employment Division v. Smith* made clear that people of faith should turn in the first instance to the

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[7] *See, e.g., Larkin v. Grendel's Den*, 459 U.S. 116, 123-24 (1982) (finding secular purpose in regulating liquor sales in manner to protect disruption of church activities); *Gillette v. United States*, 401 U.S. 437 (1971) (exemption from military draft that lifts government-imposed burden on religious exercise of conscientious objectors advances a permissible secular purpose); *Zorach*, 343 U.S. at 314 (excepting religious students from mandatory public school attendance during certain hours of the day to obtain religious instruction does not violate Establishment Clause).

legislative and executive branches, rather than the courts, for the protection of religious liberty:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also *a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.*

494 U.S. 872, 890 (1990) (emphasis added).

Thus, for example, while *Smith* rejected the claim that the Free Exercise Clause mandated an exemption to drug laws, the Court noted with approval the many legislative accommodations of religious peyote use. *Id.* (noting that "a number of States have made an exception to their drug laws for sacramental peyote use"). Such accommodations are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption.[8]

Accordingly, RLUIPA's purpose of alleviating government burdens on prisoners' religious exercise is a permissible secular purpose. *See Amos,* 483 U.S. at 335; *Zorach*, 343 U.S. at 314.[9] *See also Benning*, 2004 WL

[8]*See, e.g., Lee v. Weisman*, 505 U.S. 577, 628–29 (1992) (Souter, J., concurring) ("[I]n freeing the Native American Church from federal laws forbidding peyote use, . . . the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans."); *Peyote Way Church v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (exemptions from peyote laws for religious use do not violate Establishment Clause).

[9]Moreover, this Court's precedent makes clear that the Free Exercise Clause requires the government to provide some accommodation of

2749172, at *8-9 (holding that RLUIPA Section 3 has secular purpose of alleviating burdens on religious exercise); *Madison*, 355 F.3d at 310 (same); *Charles*, 348 F.3d at 610 (same); *Mayweathers*, 314 F.3d at 1068 (same).

B. RLUIPA Does Not Have the Primary Effect of Advancing Religion.

1. RLUIPA does not cause the government *itself* to advance religious exercise, but rather to avoid interference with private actors as they engage in religious exercise.

RLUIPA satisfies the second *Lemon* factor, because alleviating burdens on religious exercise does not have the primary effect of advancing religion. RLUIPA merely reduces intrusion and oversight by the government into how individuals practice their religion. While this may better enable those *individuals* to advance *their* religious purposes, this Court has held this to be a permissible effect:

> A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, "for the men who wrote the Religion Clauses of the First

prisoners' religious exercise. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) ("Inmates clearly retain protections afforded by the First Amendment, . . . including its directive that no law shall prohibit the free exercise of religion."); *Cruz v. Beto*, 305 U.S. 319, n. 5 (1972) ("reasonable opportunities must be afforded to all prisoners to exercise" their religion). Alhough RLUIPA goes beyond the minimum level of accommodation this Court has held is necessary in prisons, the Act's purpose of lifting government-imposed burdens on the religious exercise of prisoners is no less permissible than that of the Free Exercise Clause, which also requires lifting some (albeit fewer) burdens of this sort.

> Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Amos, 483 U.S. at 337 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)) (emphasis in original).

Here, RLUIPA, like the Title VII exemption approved in *Amos*, does not involve the *government itself* advancing religion.[10] Instead, RLUIPA simply permits prisoners some latitude to practice and define their own religious exercise by limiting government interference. Put another way, RLUIPA's lifting of any non-compelling, state-imposed regulation that substantially burdens religious exercise is an example of "benevolent neutrality" that "permit[s] religious exercise to exist without sponsorship and without [government] interference." *Amos*, 483 U.S. at 334. *See Madison*, 355 F.3d at 318 ("Congress has simply lifted

[10]*Amos* cannot be distinguished on the grounds that the Title VII accommodation at issue there was required by the Religion Clauses. *See Cutter*, 349 F.3d at 263 (suggesting that the accommodation in *Amos* was necessary to avoid violating First Amendment). That issue was not addressed in *Amos*. Indeed, the Court expressly *declined* to rest its decision on the ground that Title VII's applicability to religious groups, prior to the enactment in 1972 of the legislative accommodation for religious organizations challenged in *Amos*, violated the Free Exercise Clause so that the 1972 amendment was constitutionally mandated. *Amos*, 483 U.S. at 336 ("We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more"). Moreover, the Court took pains to point out that "[i]t is well established . . . that [t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Id.*, 483 U.S. at 334 (internal quotation omitted). Equally infirm is the argument that the Court based its decision upholding the exemption in *Amos* on the view that the exemption was required by the Establishment Clause. As the Eleventh Circuit recently pointed out, "no such language or distinction" that would support such a position appears in the majority opinion in *Amos*. *Benning*, 2004 WL 2749172, at *11.

government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths"). That benevolent neutrality is especially important in prison, where every facet of a person's life is controlled by the government, and religious exercise is all but impossible without the government's affirmative acquiescence and accommodation.[11]

2. None of the rationales proffered by the lower court distinguishes RLUIPA from the myriad accommodations of religious exercise by the political branches that "follow[ ] the best of our traditions."

In discussing the effects prong of *Lemon*, the lower court failed meaningfully to distinguish the controlling analysis of *Amos,* or its application by the numerous other courts upholding RLUIPA and RFRA against Establishment Clause challenge. The lower court's anomalous opinion

[11]A similar desire to lift government-imposed burdens on religious exercise in the heavily regulated area of land-use motivated Congress to enact RLUIPA's land use provisions. Congress "compiled massive evidence," 146 CONG. REC. S7774 (daily ed. July 27, 2000)—based on nine hearings over three years—that the autonomy and vitality of houses of worship were threatened by the pervasive and discretionary regulation embodied in local land-use laws. *See* 146 CONG. REC. S7775 ("The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case"). Thus, the passage of RLUIPA—both its land use and prisoner provisions—is testament to the fact that religious organizations rely heavily on *Amos*' upholding of legislative accommodations of religious exercise. Any narrowing of *Amos* that would require accommodations to come packaged with accommodations for secular interests would severely impact religious liberty by making it far more difficult to enact laws that carve out space within the regulatory state for the free exercise of religion.

invokes four rationales in an effort to escape *Amos*, all foreclosed by longstanding precedent of this Court.

a. The Establishment Clause does not prohibit laws passed solely to accommodate religious exercise.

The lower court did not even attempt to show that RLUIPA involves the "government itself" advancing religion. *Amos*, 483 U.S. at 337. Nonetheless, the lower court still faulted RLUIPA because it accommodates religious exercise without *also* accommodating other rights. *See Cutter*, 349 F.3d at 266. But this Court has expressly rejected this rule, holding instead that where "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. Legion other courts have rejected arguments like this over and over again in upholding Sections 2 and 3 of RLUIPA.[12] Nor could it be otherwise, as the theory below is fraught with problems on many levels.

[12] *See, e.g., Benning*, 2004 WL 2749172, at *9 ("Singling out free exercise rights for protection is not an impermissible endorsement of religion. . . . [T]he Supreme Court has not held that legislative protections for fundamental rights march in lockstep.") (internal quotation omitted); *Madison*, 355 F.3d at 318-19 (holding that under *Amos* "[t]he Establishment Clause's requirement of neutrality does not mandate that when Congress relieves the burdens of regulation on one fundamental right, that it must similarly reduce government burdens on all other rights."); *Mayweathers*, 314 F.3d at 1069 (holding that under *Amos*, RLUIPA "does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non-religious prisoners."); *Charles*, 348 F.3d at 610 (same); *Johnson*, 223 F. Supp. 2d at 826 (rejecting argument "that merely because Congress has acted to provide religious activity with special protection and has not done the same for secular activity, that Congress has advanced religion").

First, it presents insuperable practical problems. On the lower court's view, the Establishment Clause would run amok, taking a wrecking ball to countless acts of the political branches—legislative and executive, federal, state, and local—whose *sole* purpose and effect is to accommodate religious exercise. *See, e.g., Benning*, 2004 WL 2749172, at *9 (holding that any Establishment Clause interpretation that prohibited laws designed solely to protect religious exercise "would cut a broad swath through a forest of government programs and protections of religious exercise"); *Madison*, 355 F.3d at 320 (declining to follow *Cutter* because its Establishment Clause interpretation "would throw into question a wide variety of religious accommodation laws").

For starters, the lower court's anti-accommodation rule would invalidate the special protections afforded to religious exercise by *Ohio's Constitution*. Although the federal Free Exercise Clause extends only rational basis scrutiny to neutral and generally applicable laws that burden religious exercise, *see Smith*, *supra*, Ohio goes beyond the federal constitutional floor and provides broader protection under its state constitution by applying strict scrutiny to *all* laws (even neutral and generally applicable ones) that burden religious exercise. *See Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000).[13] Thus, Ohio's Constitution provides special protection to claims for religious exemptions, without extending parallel protections to corresponding non-religious claims. But under the lower court's rule, this protection for religious exercise would violate the Establishment Clause.

The decision below would similarly run roughshod over a whole host of *Ohio statutes* that accommodate religious exercise by affirmatively lifting burdens on

[13] *See also Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution").

religious exercise, without also lifting burdens on non-religious activities. Appendix B to this brief lists a sample of Ohio laws that accommodate religious exercise. Because none of these laws also seeks to accommodate other secular constitutional rights, the lower court's test would arguably strike down most, if not all, of these Ohio laws.[14]

Moreover, if allowed to stand, the rationale of the court below would potentially invalidate numerous other federal and state acts whose *sole* purpose and effect is to accommodate religious exercise. This includes, among many others, the *federal statutory* accommodations of religious peyote use,[15] religious headwear in the military,[16] and Native American religious exercise on federal land;[17] other *state constitutional* provisions that, like Ohio's discussed above, provide stronger protections for religious exercise (and only religious exercise) than the federal Free Exercise Clause;[18] *state statutes* that provide broader protection to religious exercise (and only religious exercise) than required by the federal or state constitution;[19] *prison and armed forces chaplaincy programs* that facilitate religious exercise (and only religious exercise);[20] the state and federal *clergy-*

[14]By listing the various religious accommodations in the Appendix, the members of the Coalition do not intend to express that they consider any or all of them good policy or even that each of them is constitutional under the Establishment Clause. The point, instead, is that the constitutionality of all of these accommodations would be called seriously into question if the lower court's opinion stands.

[15]*See* 42 U.S.C. § 1996a (requiring states to allow the Native American Church to use peyote in religious ceremonies). *See also Benning*, 2004 WL 2749172, at *9 (noting that 28 state statutes provide a religious exemption for peyote use).

[16]*See* National Defense Authorization Act for Fiscal Years 1988 and 1989, 10 U.S.C. § 774; *see also Texas Monthly v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) ("[I]f the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, . . . that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.") (citation omitted).

[17]*See* Department of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (de-funding project that would have destroyed government land used for Native American religious exercise in response to statement in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 435 U.S. 439, 454 (1988), that "[t]he Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religio. practices like those engaged in by the Indian respondents").

[18]Since this Court's *Smith* decision, the courts of at least *ten* states besides Ohio have held that their state constitutions provide broader protection for religious exercise (and only religious exercise) than the federal *Smith* rule. *See, e.g., In re Browning*, 476 S.E.2d 465 (N.C. 1996); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Rourke v. N.Y. State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *State v. Evans*, 796 P.2d 178 (Kan.1990); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

[19]Since this Court's *Smith* decision, the political branches of at least *thirteen* states have, either by statute or constitutional amendment, provided stronger protection for religious exercise (and only religious exercise). Those thirteen states are Alabama, *see* ALA. CONST. amend. 622; Arizona, *see* ARIZ. REV. STAT. ANN. §§ 41-1493 *et seq.* (West 2003); Connecticut, *see* CONN. GEN. STAT. ANN. § 52-571b (West 2003); Florida, *see* FLA .STAT. ANN. §§ 761.01-761.04 (West 2003); Idaho, *see* IDAHO CODE §§ 73-401 *et seq.* (Supp. 2002); Illinois, *see* 775 ILL. COMP. STAT. ANN. §§ 35/1 -35/99 (West 2002); Missouri, *see* V.A.M.S. §§ 1.302 & 1.307 (West 2004); New Mexico, *see* N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie 2002); Oklahoma, *see* OKLA. STAT. ANN. tit. 51, §251 (West 2003); Pennsylvania, 71 PA. CONS. STAT. ANN. 2401 *et seq.*; Rhode Island, *see* R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2001); South Carolina, *see* S.C. STAT. ANN. § 1-32-10 (Law. Co-op. 1999); and Texas, *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 *et seq.* (West 2003).

[20]*See, e.g., Mockaitis*, 104 F.3d at 1530 (observing that RFRA does not impermissibly promote religion anymore than "[t]he creation of chaplaincies . . . in the armed forces ."); *Katcoff v. Marsh*, 755 F.2d 223,

penitent privilege;[21] and even *particular prison regulations* adopted by the Federal Bureau of Prisons that accommodate religious exercise (and only religious exercise).[22]

Another strange consequence of the lower court's reasoning is that if legislative and executive officials would merely tack on to each protection of religious exercise the protection of another right, then the entire (alleged) constitutional problem would disappear. But the Establishment Clause does not exist to require government actors to undertake such formalistic (and completely unprecedented) exercises. *See Madison*, 355 F.3d at 320 (noting "[t]he byzantine complexities that such compliance would entail"). Indeed, this Court has squarely rejected that argument when it explained that it:

> has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the purpose of lifting a regulation that burdens the exercise of religion, *we see no reason to require that the exemption comes packaged with benefits to secular entities*.

Amos, 483 U.S. at 338 (emphasis added).

Indeed, if the purpose of the Establishment Clause really were to preclude laws that *single out* religious exercise for protection from government interference, then the Establishment Clause would squarely contradict the Free Exercise Clause, which does precisely that. *See Lynch v. Donnelly,* 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

Second, the lower court's theory creates a conceptual problem. The Establishment Clause certainly *does* require some form of "neutrality," but that neutrality is "between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968)—*not* between religious exercise and all other rights or values, as the lower court would have it. Certainly government cannot affirmatively advance or benefit the religious at the expense of the nonreligious: the state cannot imprison those who refuse to believe in a Creator, or withhold welfare checks from the atheist. But the government can—and often does—protect a *single* right or value in a particular piece of legislation or regulation, and free religious exercise is no exception.[23] Such government actions do not "prefer"

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232 (2d Cir. 1985) (rejecting Establishment Clause challenge to military chaplaincy program).

[21]All fifty states and the federal government specially accommodate religious exercise by recognizing some form of the clergy-penitent privilege. *See Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 231 & n.39 (April 1998).

[22]*See, e.g.,* Federal Bureau of Prisons, Program Statement on Religious Beliefs and Practices, PS 5360.08 (May 25, 2001) (available at http://www.bop.gov/progstat/5360_008.pdf), at 15 (providing religious prisoners accommodation for religious use of wine, an otherwise contraband substance); *id.* at 10-11 (providing religious prisoners relief from generally applicable work duties in order to observe religious holidays); *id.* at 11-12 (providing religious prisoners accommodation to allow visits by outside religious advisors that do not count against the limit otherwise posed on social visits from outsiders).

[23]*See, e.g.,* Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa *et seq.* (reacting to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), and providing journalists with greater protection against searches and seizures); Department of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (reacting to statement in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988), that "[t]he Government's

religion over irreligion; instead, they simply protect religious exercise, just as they would any other right or value.[24] As Judge Wilkinson, writing for the Fourth Circuit, recently held, "[i]t was reasonable for Congress to seek to reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography." *Madison*, 355 F.3d at 319. Moreover, this Court has never held or even suggested "that legislative protections for fundamental rights march in lockstep." *Id.* at 318. Not only would "a requirement of symmetry of protection for fundamental liberties" ignore this Court's precedent, "but it would also place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-guessing at every turn." *Id.* at 319.

Lacking any authority of this Court or any other for its position, the lower court was forced to rely on a hypothetical discussed in the overruled decision in *Madison v. Riter*, 240 F. Supp. 2d 566, 576 (W.D.Va. 2003), *overruled* 355 F.3d 310 (4th Cir. 2003). The court posited two white supremacist prisoners—one secular and the other an adherent to the Church of Jesus Christ Christian, Aryan Nation—who

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rights to the use of its own land . . . *need not and should not discourage it from accommodating religious practices* like those engaged in by the Indian respondents" (emphasis added), and defunding the project at issue in *Lyng* that would have destroyed the government land used for religious exercise); Exemption Act of 1988, 26 U.S.C. § 3127 (reacting to *United States v. Lee*, 455 U.S. 252 (1982), which declined to recognize Amish free exercise of religion claim, providing a tax exemption for employers and their employees who are members of "a recognized religious sect" whose "established tenets" oppose participation in Social Security); National Defense Authorization Act, 10 U.S.C. § 774.

[24]Following the lower court's logic to its conclusion leads to other absurdities. For example, if protecting religious exercise rights alone reflects impermissible *favor* for religion, then protecting any right alone *other than* religious exercise would reflect impermissible *disfavor* for religion. *See Benning*, 2004 WL 2749172, at *9.

want to challenge a prison's decision not to let them possess white supremacist literature. According to the hypothetical, assuming the showing of a substantial burden on religious exercise, the religious prisoner would be able to challenge a failure to accommodate his beliefs under RLUIPA's strict scrutiny standard, while the secular prisoner's free speech and association claims against the policy would be governed by the more deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987). Thus, the lower court asserted, RLUIPA's accommodation of religious exercise "advance[s] religion generally by giving religious prisoners rights superior to those of nonreligious prisoners." *Cutter*, 349 F.3d at 266.

This hypothetical does not raise an Establishment Clause concern any more than does any other religious accommodation that ordinarily permits religiously motivated persons to engage in conduct forbidden to persons motivated by secular reasons. For example, secular employers, unlike religious employers, do not have an exemption under Title VII to implement hiring standards that favor co-religionists and disfavor those of other faiths. Nonetheless, this Court upheld such an accommodation in *Amos*.

Moreover, applying the reasoning of this hypothetical to factual circumstances *actually addressed* by this Court reveals starkly that this Court has *already* rejected that reasoning. For example, in *Amos*, this Court approved a provision of Title VII that exempted religious organizations—and only religious organizations—from the statute's general prohibition of religious discrimination in employment. *See also Madison*, 355 F.3d at 319 (*Amos* "does not at all indicate that Congress must examine how or if any other fundamental rights are similarly burdened").

And why has this Court (and faithful lower courts) so consistently rejected Establishment Clause challenges to these laws? In short, government must be free to *specially*

deregulate religious exercise, because it is a category of private activity in which government interference is *uniquely* misplaced. To challenge that is to challenge the values embodied in the Religion Clauses themselves. The same principle applies to RLUIPA—it lifts burdens only on religious exercise in order to *minimize* government interference with a human phenomenon that the Constitution itself recognizes to be uniquely sensitive to government interference.[25] Thus, in accordance with the overwhelming weight of authority—and notwithstanding the superficial appeal of a single hypothetical—RLUIPA does not offend the Establishment Clause.[26]

Third, the lower court's theory ignores the history of the Religion Clauses. Laws that exist solely to accommodate religious exercise are so numerous because they represent a time-honored American tradition.[27] And, as discussed

[25]Of course, the First Amendment and laws like RLUIPA seek only to minimize government involvement in private religious conduct, not to eliminate it altogether. Even under these laws, whenever the specific religious practice of white supremacists (or any other prisoner) would create a demonstrable threat to the safety of other prisoners or to prison security, prison administrators could still forbid the practice.

[26]In any event, even if it were conceivable that granting a particular accommodation requested by a prisoner would place the government at risk of violating some other constitutional right—and *no* RLUIPA or RFRA case to date has presented such a situation—such hypotheticals are not grounds to sustain a facial challenge to the Act.

[27]*See, e.g., Kiryas Joel v. Grumet*, 512 U.S. 687, 705 (1994) ("Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice."); *Walz*, 397 U.S. at 676 ("Few concepts are more deeply embedded in the fabric of our national life … than for the government to exercise *at the very least* this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.") (emphasis added); *Benning*, 2004 WL 2749172, at *9 (declining to follow *Cutter* because "[a] sweeping invalidation of all accommodations of religion is wholly inconsistent with the history, traditions, and laws of our nation").

previously, accommodations by the political branches are all the more imperative since *Smith* narrowed the judiciary's role in this area. In other words, if the lower court's theory were accepted, then the *Smith* Court's invitation to enact religious accommodations, *see Smith*, 494 U.S. at 890, would appear to be an inducement to violate the Establishment Clause.[28]

For all these reasons, then, this Court should reject the lower court's invitation to depart from prior precedent and hold unconstitutional laws that focus solely on removing government-imposed burdens on religious exercise.

b. The mandates of the Free Exercise Clause are not a ceiling on permissible accommodation of religious exercise.

The lower court also suggested that RLUIPA impermissibly advances religion because its accommodation of religious exercise exceeds what this Court has required under the Free Exercise Clause in the prison setting. *See Cutter*, 349 F.3d at 266. But this argument proves too much. On this theory, *any* accommodation of prisoner religious exercise that is not mandated by the Free Exercise Clause would violate the Establishment Clause.

Once again, this argument ignores the nation's long history of specially accommodating religious exercise; would invalidate wholesale numerous federal and state laws that accommodate religion beyond what the Free Exercise Clause requires; and ignores *Smith*'s specific invitation to the political branches to provide that additional measure of

[28]Notably, the *Smith* Court, in encouraging the political branches to take responsibility for accommodating religious exercise, did not even *suggest* that those accommodations would be permissible only if packaged with other "secular" rights.

accommodation.[29] But most importantly, *Amos* forecloses this argument. As the Court put it there, "[i]t is well established . . . that the limits of permissible accommodation of religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334.

c. RLUIPA does not have any impermissible effects on the interests of others.

As an alternative argument under *Lemon*'s effects prong, the lower court's opinion asserts that RLUIPA has impermissible effects on "non-religious persons." *Cutter*, 349 F.3d at 266. The only authority cited by the lower court in support of its position is the plurality opinion in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989). But in finding that the Texas statute's unqualified exemption of certain religious publications from a state sales tax was unconstitutional, that plurality opinion expressly distinguished the case before it from one involving "remov[al of] a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15 (plurality opinion). Here, of course, RLUIPA alleviates just such a deterrent to religious exercise, by generally relieving substantial burdens on prisoners' religious exercise. *See also id.* at 18 n.8 ("we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden

[29] *See, e.g., United States v. Marengo Cy. Comm'n*, 731 F.2d 1546, 1562 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984) ("[C]ongressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place."); *Mayweathers*, 314 F.3d at 1070 ("RLUIPA does not erroneously review or revise a specific ruling of the Supreme Court. . . . Rather, RLUIPA provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor—not a ceiling—for the protection of personal liberty").

by the Establishment Clause unless they are mandated by the Free Exercise Clause.") (emphasis in original).

Moreover, unlike the absolute exemption for religious publications in *Texas Monthly*, RLUIPA does not give religious prisoners an unfettered right to religious exercise. To the contrary, in both its text and implementation by the courts, RLUIPA takes account of the countervailing interests that non-religious persons might have in response to a particular religious practice. Thus, for example, if a prisoner's desired religious practice were to create a safety or security risk for other prisoners or prison guards, the Act does not require those third parties to bear that harm. The Act's legislative history specifically notes that the right to engage in a particular religious practice under RLUIPA may be overcome where a prison demonstrates that the practice would adversely affect the ability to "maintain good order, security and discipline."[30] Consistent with this design, a substantial body of case law under RLUIPA and RFRA confirms that safety and security risks are exactly the types of "compelling interest[s]" that justify prison administrators' denial of accommodation requests.[31]

In addition, unlike the statute held invalid in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985) (striking down a Connecticut statute imposing an *absolute* condition that private employers retain private employees who refused

[30] Joint Statement, 146 CONG. REC. at S7775.

[31] *See, e.g., Charles v. Frank*, 2004 WL 1303403, at *2 (7th Cir. Jun. 4, 2004) (holding that "suppressing gang activity to promote a secure and safe prison environment is indisputably a compelling interest"); *Ulmann v. Anderson*, No. 02-405, 2004 WL 883221, at *8 (D.N.H. Apr. 26, 2004) (denying prisoner access to religious item that could be converted into a weapon advanced prison's compelling interest of maintaining safety). *See also May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) (holding under RFRA that maintaining prison security is a compelling government interest); *Lawson v. Singletary*, 85 F.3d 502, 512 (11th Cir. 1996) (same); *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) (same).

to work on the Sabbath), RLUIPA does not invest religious prisoners with absolute rights. Instead, it provides a means to account for the interests of others who might be impacted by a particular religious practice. Moreover, unlike RLUIPA, the *Caldor* statute did not lift a government-imposed burden on religious exercise; instead, it lifted privately-imposed burdens on religious exercise by imposing "substantial" and "significant" costs on other private parties. *Id.* at 708-10. Given RLUIPA's differences from the Connecticut statute, it is not surprising that the lower court in this case did not even attempt to rest its holding on *Caldor*.

At the very least, there is no basis for holding RLUIPA to be *facially* unconstitutional because of any alleged impermissible effects on others. In many, if not most, RLUIPA cases, the requested accommodation will not impose any harm at all on other prisoners, guards, or other third parties. For example, it is difficult to see how allowing a Greek Orthodox prisoner to receive communion wine or a Jewish prisoner to receive a kosher diet has any adverse impact on the lives of other prisoners or prison guards. Certainly these examples appear to pose less of a threat to the safety of prisoners and prison guards than other practices that Ohio's prisons *do* allow, such as allowing prisoners to wield the instruments necessary to slaughter animals.[32]

Lacking any precedent, then, for its holding that RLUIPA has impermissible effects on "non-religious persons," the lower court resorted to conjecture, asserting that RLUIPA will "induce prisoners to adopt or feign religious belief in order to receive the statute's benefits." *Cutter,* 349 F.3d at 266. As an initial matter, the lower court's claim rests on the dubious assumption that the religious exercise RLUIPA accommodates is typically

[32]*See* "Inmates to Help Slaughter Their Own Beef" http://www.wkyc.com/news/news_fullstory.asp?id=25937.

desirable to other prisoners. But this assumption has no basis in the record before Congress or elsewhere. Acts of religious faith, though deeply meaningful to an adherent, often appear irrational or baffling to a non-adherent, thus inviting derision rather than envy. Similarly, the rigorous attention to detail and form required by many religious observances (*e.g.,* keeping a kosher diet) makes feigned devotion improbable.[33]

But even if a few prisoners did feign belief to try to take advantage of RLUIPA, the Act (like RFRA) does not prevent prison administrators from inquiring, as courts also may, into the sincerity of the religious beliefs of prisoners. Indeed, RLUIPA calls for such an inquiry, and puts the burden of proof on the prisoner-claimant. Just as sincerity of belief is a "threshold requirement" for a Free Exercise claimant,[34] so too have lower courts held that it is a threshold showing for a RLUIPA or RFRA claimant.[35] Thus, even assuming that a flood of religion-faking, claim-filing prisoners were to emerge after RLUIPA—and there is absolutely no evidence that it has—prison administrators retain the means to address the issue of feigned belief.

Finally, even where a particular religious accommodation may be desirable for reasons other than faith, (*e.g.,* consuming wine for communion), that fact alone would hardly render an accommodation unconstitutional. If that

[33]In addition, the fact that religious practice typically imposes various kinds of costs on its practitioners greatly reduces the risk of feigned religiosity. *See, e.g., University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (costs and burdens borne by overtly religious colleges significantly reduces the risk that a college will feign religiosity in order to receive a religious exemption from federal labor laws).

[34]*See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002).

[35]*See, e.g., Coronel v. Paul*, 316 F. Supp. 2d 868, 876 (D. Ariz. 2004) (RLUIPA requires a showing that the desired conduct is "motivated by sincere religious belief"); *Kikumura v. Hurley,* 242 F.3d 950, 960 (10th Cir. 2001) (sincere religious belief required to prevail under RFRA).

were true, then all sorts of religious accommodations in all sorts of contexts (even those required by the more deferential *Turner v. Safley* test) would be at risk of violating the Establishment Clause by creating some incentive, no matter how small, to feign religious belief. For example, such an inducement to feign religious belief would presumably arise from an act providing a religious exemption from the general prohibition against peyote use. Indeed, if peyote is a desirable (yet dangerous) hallucinogenic substance, as those who have outlawed it believe, *see* 21 U.S.C. § 812 (making peyote a Schedule 1 controlled substance), the inducement to fake religious devotion to obtain the benefit of the accommodation would seem particularly strong. But in directing religious peyote users to the legislature to obtain a religious exemption, this Court did not even suggest that the exemption might induce false piety in violation of the Establishment Clause. *See Smith*, 494 U.S. at 890.[36]

d. RLUIPA scrupulously avoids any impermissible endorsement of religion.

Finally, the argument of the lower court drawn from endorsement jurisprudence must also fail, as RLUIPA avoids any impermissible endorsement of religion in general, or of any particular religion. In the lower courts, some prison officials have argued that RLUIPA violates *Lemon*'s "effects" prong because it "convey[s] a message that religion is favored or preferred . . . over disbelief." *See, e.g.*, Brief of Defendants-Appellants at 49 in *Charles v. Verhagen*, No. 02-3572 (7th Cir. 2003) (arguing that RLUIPA impermissibly "favor[s] religious belief over disbelief") (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 635 (1989) (O'Connor, J., concurring)). But that argument—which would also make

[36]Congress took this Court at its word in *Smith* and passed the American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a, which allows the Native American Church to use peyote.

religious accommodations *per se* unconstitutional—is flatly contrary to *Amos* and to other decisions of this Court and opinions of its individual Justices. Indeed, this Court has *never* invalidated an accommodation on this ground.

The accommodation upheld in *Amos*, for example, was limited to religious employers seeking to make personnel decisions on the basis of religious criteria. The statute contained no analogous accommodation for organizations—like gender or race-specific advocacy groups—that might have had similarly legitimate reasons for making personnel decisions on the basis of gender or race. Yet no member of the Court found that this disparity created an impermissible endorsement of "religion . . . over disbelief" or, indeed, of the religious over the secular.

Justice O'Connor's opinion concurring in the judgment cogently explained why this disparity is not an endorsement of religion. She noted that, even where an accommodation is limited to religion and is not required by the First Amendment, it will not give rise to an impermissible endorsement as long as there is "an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action." *Amos*, 483 U.S. at 348 (O'Connor, J., concurring) (emphasis in original). That is because, as Justice O'Connor had previously explained in *Wallace v. Jaffree*, the endorsement inquiry must be undertaken from the standpoint of a well-informed, "objective observer," who "is acquainted with the Free Exercise Clause *and the values* it promotes." 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) (emphasis added). Thus, even where an accommodation is not constitutionally required, "one can plausibly assert that government pursues Free Exercise Clause *values* when it lifts a government-imposed burden on the free exercise of religion." *Id.* (emphasis added). In that circumstance, an "objective observer should perceive the Government action as an accommodation of the exercise of

religion rather than as a Government endorsement of religion." *Amos*, 483 U.S. at 349.

The same analysis applies here, with at least as much force as in *Amos*. Here, there can be no question that incarceration itself creates significant, government-imposed burdens on religious exercise. *See, e.g., Turner*, 482 U.S. at 89-90. By providing a means in some cases for those burdens on religious exercise to be lifted, RLUIPA, like the statute in *Amos*, is properly seen "as an accommodation of the exercise of religion rather than as a Government endorsement of religion." *Amos*, 483 U.S. at 349.

Furthermore, RLUIPA poses even less of an endorsement issue than the statute in *Amos*. Whereas the statute in *Amos* created a blanket religious exemption, RLUIPA does not seek to lift burdens on religious exercise across the board. Instead, RLUIPA first requires that a prisoner demonstrate that a *specific* state-imposed restriction imposes a substantial burden on that specific prisoner's religious exercise.[37] This requirement guarantees that, in every case, there is "in fact . . . an identifiable burden *on the exercise of religion* that can be said to be lifted by" the statute. *Amos*, 483 U.S. at 348 (emphasis in original). But that is not all. As discussed above, RLUIPA then allows a state to preserve its restriction—and the corresponding burden on religious exercise—if it can demonstrate that the restriction is the least restrictive means of pursuing a compelling state interest. *See* 42 U.S.C. § 2000cc-1(a).

Thus, unlike the statute upheld in *Amos*, RLUIPA's burden-lifting function is both burden-specific and contingent on the absence of countervailing compelling state interests.

[37]*See* 42 U.S.C. § 2000cc-2(b) ("the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion").

If the general burden-lifting statute upheld in *Amos* does not create an impermissible endorsement, *a fortiori* the much more limited burden-lifting provisions of RLUIPA cannot create such an endorsement either.

RLUIPA's generality further minimizes any possible risk of impermissible endorsement. To be sure, this Court has never required religious accommodations to be of equal benefit to all beliefs and believers. *See, e.g., Lee*, 505 U.S. at 628–29 (Souter, J., concurring) ("[I]n freeing the Native American Church from federal laws forbidding peyote use, … the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans"). But where, as here, the accommodation statute is cast in general terms and, in principle, is equally available to all believers of whatever stripe, the risk that an objective observer will see the exemption as "Government endorsement of religion" rather than as a legitimate "accommodation of . . . religion," *Amos*, 483 U.S. at 349, is truly minuscule.

In sum, RLUIPA does not "impermissibly advance" religion within the meaning of this Court's Establishment Clause jurisprudence. *Lemon*, 403 U.S. at 613. *See also Amos*, 483 U.S. at 348 (permissible accommodations are not "unjustifiable awards of assistance" to religious people or organizations) (O'Connor, J., concurring). For RLUIPA does not involve the "government itself" advancing religion, *Amos*, 483 U.S. at 337. Instead, the Act "pursues Free Exercise Clause values [by] . . . lift[ing] a government-imposed burden on the free exercise of religion." *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring).

C. RLUIPA Does Not Foster Excessive Entanglement with Religion.

No circuit court, not even the court below,[38] has found RLUIPA excessively entangling, as RLUIPA entails no greater entanglement than the ordinary application of Free Exercise doctrine. For example, even under the deferential *Turner* test for Free Exercise claims, the government must determine whether the practices to be accommodated are both religious and sincerely held.[39] Thus, RLUIPA "does not require prison officials to develop expertise on religious worship," *Mayweathers*, 314 F.3d at 1069, any more than the well-established *Turner* test does.[40] Thus, finding excessive entanglement here would contradict not only common sense, but also this Court's emphasis that "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Amos*, 483 U.S. at 334 (internal quotation omitted).

[38]*See Cutter*, 349 F.3d at 267 ("[W]e question whether RLUIPA requires any greater interaction between government officials and religion than exists under present law").

[39]*See, e.g., Sutton v. Rasheed*, 323 F.3d 236, 250-51 (3d Cir. 2003) (holding that a court deciding an inmate's Free Exercise claim must first determine whether the belief at issue is "religious" and "sincere"); *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) (same); *Kent v. Johnson*, 821 F.2d 1220, 1224 (6th Cir. 1987) (same); *Dettmer v. Landan*, 799 F.2d 929, 931-32 (4th Cir. 1986) (same). *See also Mockaitis*, 104 F.3d at 1530 ("Of course, application of RFRA, like the application of the First Amendment itself and any objection made under this amendment, requires a court to determine what is a religion and to define an exercise of it. There is no excessive entanglement").

[40]In addition, RLUIPA's definition of "religious exercise," 42 U.S.C. § 2000cc-5(7)(A), like Free Exercise doctrine itself, is designed to minimize entanglement by precluding inquiry into the rationality of a belief or its centrality within a system. *See, e.g., Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Thomas v. Review Bd. of Ind.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

In sum, because RLUIPA—like so many other religious accommodations—satisfies all three elements of the *Lemon* test, it does not violate the Establishment Clause.

II. RLUIPA Section 3 Is a Constitutional Exercise of Congress' Spending Power.

Every court to address the issue of whether RLUIPA Section 3 is a valid exercise of Congress' Spending Power has concluded that RLUIPA fits comfortably within the limits of that power.[41] The Coalition's members fully agree with the analysis of the lower courts that have rejected Spending Clause challenges, as well as with the arguments submitted by the Petitioners in this case.

III. RLUIPA Section 3 Is a Constitutional Exercise of Congress' Commerce Power.

In *United States v. Lopez*, 514 U.S. 549, 561 (1995), this Court made clear that a statute enacted under the Commerce Clause is not facially unconstitutional if it contains a jurisdictional element that "ensure[s], through case-by-case inquiry, that [the activity in question] affects interstate commerce." Unlike the challenged statutes in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), RLUIPA *is* supported by an "express jurisdictional element which might limit its reach to a discrete set of [burdens on prisoners' religious exercise] that additionally have an explicit connection with or effect on interstate commerce." *Morrison,* 529 U.S. at 611-12 (internal quotation omitted). Accordingly, the presence of a jurisdictional element in RLUIPA Section 3(b)(2) suffices alone to reject a *facial* challenge to the Act as exceeding the limits of the Commerce

[41]*See, e.g., Benning*, 2004 WL 2749172, at *3-6 (rejecting Spending Clause challenge to RLUIPA Section 3); *Charles*, 348 F.3d at 608 (7th Cir. 2003) (same); *Mayweathers,* 314 F.3d at 1067 (9th Cir. 2002) (same).

power: by its own terms, RLUIPA applies only to conduct affecting "commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2). *Compare id. with* U.S. CONST. Art. I., § 8, cls. 3.

The jurisdictional element also precludes *as-applied* challenges under the Commerce Clause. If the conduct at issue in a particular case satisfies the jurisdictional requirement of Section 3(b)(2), then the conduct also falls within the sweep of the commerce power and may be regulated constitutionally. But if the facts do not satisfy the jurisdictional element, then the Act does not even *reach* the conduct under the commerce power. Thus, RLUIPA respects constitutional limits by not regulating conduct outside the scope of the Commerce power. *See, e.g., United States v. Grassie,* 237 F.3d 1199, 1211 (10th Cir 2001) ("[B]y making interstate commerce an element of the [Church Arson Prevention Act] … to be decided on a case-by-case basis, constitutional problems are avoided"). In other words, the Act applies either constitutionally, or not at all.

CONCLUSION

For the foregoing reasons, this Court should uphold Section 3 of RLUIPA as constitutional.

Respectfully submitted,

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APPENDIX A

The Coalition for the Free Exercise of Religion includes the following organizations:

Agudath Israel of America
Aleph
American Center for Law and Justice
American Ethical Union
Americans for Religious Liberty
American Jewish Committee
Anti-Defamation League
Association of Christian Schools International
Association on American Indian Affairs
Baptist Joint Committee
Becket Fund for Religious Liberty
B'nai B'rith International
Central Conference of American Rabbis
Christian Legal Society
Clifton Kirkpatrick, Stated Clerk of the Presbyterian Church (USA)
Council on Religious Freedom
Council on Spiritual Practices
Ethics & Religious Liberty Council of the Southern Baptist Convention
Friends Committee on National Legislation
General Council on Finance and Administration of The United Methodist Church
Hadassah, the Women's Zionist Organization of America
Hindu American Foundation
Institute on Religion & Public Policy
International Church of the Foursquare Gospel
International Commission on Freedom of Conscience
Jewish Council for Public Affairs
Jewish Prisoner Services International

Jewish Reconstructionist Federation
Liberty Counsel
Liberty Legal Institute
Mennonite Central Committee U.S., Washington Office
Minaret of Freedom Institute
National Council of the Churches of Christ in the USA
National Ministries, American Baptist Churches, USA
North American Religious Liberty Association
Northwest Religious Liberty Association
People For the American Way
Peyote Way Church of God
Philadelphia Ethical Society
Prison Fellowship
Queens Federation of Churches
Rabbinical Council of America
Seventh-day Adventist Church (General Conference World Headquarters)
Shambhala International
Shaykh Mohamed Hisham Kabbani, Chairman of the Islamic Supreme Council of America
Sikh American Legal Defense and Education Fund
Soka Gakkai International—USA
The Church of Jesus Christ of Latter-day Saints
The First Church of Christ, Scientist, in Boston, Massachusetts
The Interfaith Alliance Foundation
The United House of Prayer For All People of the Church on the Rock of the Apostolic Faith
Union for Reform Judaism
Union of Orthodox Jewish Congregations of America
Unitarian Universalist Association
United Sikhs
United States Conference of Catholic Bishops
United Synagogue of Conservative Judaism

APPENDIX B

This appendix lists a sample of Ohio laws that accommodate religious exercise without also accommodating secular constitutional rights.

- Exemption for those with religious objections from service in Ohio's militia, *see* OHIO REV. CODE ANN. § 5923.02(B);

- Property tax exemption for real property held by churches, *see* OHIO REV. CODE ANN. § 5709.07(3);

- Exemption for a "rabbi, priest, Christian Science practitioner, clergy, or member of a religious order . . . when the chemical dependency counseling activities are within the scope of the performance of their regular or specialized ministerial duties . . .," from Ohio's chemical dependency counselor licensing requirements, *see* OHIO REV. CODE ANN. § 4758.03(B);

- Exemption for minors consuming certain alcoholic beverages for religious purposes from underage drinking laws, *see* OHIO REV. CODE ANN. § 4301.631(H);

- Exemption for religious employers "opposed to benefits to employers and employees from any public or private insurance that makes payment in the event of death, disability, impairment, old age, or retirement or makes payments toward the cost of, or provides services in connection with the payment for, medical services," from required payment of premiums into Ohio's worker compensation system, *see* OHIO REV. CODE ANN. § 4123.15(A);

- Exemption for employees who have religious "objections to joining or financially supporting an employee organization" from required payment of fee to employee organization who secured collective bargaining agreement, *see* OHIO REV. CODE ANN. § 4117.09 (C);

- Exemption for children whose parents have religious objections to the test from required childhood health tests, *see, e.g.,* OHIO REV. CODE ANN. § 3701.508(2)-(3) (religious exemption from hearing tests); OHIO REV. CODE ANN. § 3742.30 (religious exemption from blood lead screening test); OHIO REV. CODE ANN. § 3701.501(2) (religious exemption from tests for genetic disorders); OHIO REV. CODE ANN. § 3313.71 (religious exemption from tuberculosis tests); OHIO REV. CODE ANN. § 3313.671 (religious exemption for immunization requirements);

- Availability of absentee ballots to any "elector . . . unable to vote on the day of an election on account of observance of the elector's religious belief," OHIO REV. CODE ANN. § 3509.02(6);

- Exemption for employees with religious objections to administering drugs from requirement that public school employees administer certain prescription drugs to students, *see* OHIO REV. CODE ANN. § 3313.713(F);

- Defense for care givers who "rel[y] upon treatment by spiritual means through prayer alone" to charge of patient neglect, *see* OHIO REV. CODE ANN. § 2903.34(B)(1) ;

- Defense for parents who for religious reasons do not provide medical or surgical care to a child to charge of child neglect; *see* OHIO REV. CODE ANN. § 2151.03(8);

- Privilege from arrest for persons "within, going to, or returning from their place of worship," *see* OHIO REV. CODE ANN. § 2331.11(5);

- Clergy-penitent privilege for a communicant's confessions or other information confidentially communicated to clergy, *see* OHIO REV. CODE ANN. § 2903.34(C);

- Exemption for "cloistered member[s] of a religious organization" from jury service, *see* OHIO REV. CODE ANN. § 2331.16(5);

- Exemption for religious objections to autopsy requirement of removing deceased's pituitary gland, *see* OHIO REV. CODE ANN. § 2108.53(C);

- Exemption for those with religious objections to requirements of testing and treatment of tuberculosis, *see* OHIO REV. CODE ANN. § 339.89;

- Exemption of church property from participation in Ohio's statutorily created "special improvement districts," *see* OHIO REV. CODE ANN. § 1710.02(A);

- Exemption for "bible colleges" and "bible institutes" to requirement that institutions conferring degrees or diplomas obtain a certificate of authorization from the Ohio board of regents, *see* OHIO REV. CODE ANN. § 1713.02(E);

- Exemption of religious organizations providing funeral services from state laws governing preneed funeral contracts, *see* OHIO REV. CODE ANN. § 1111.19(L);

- Exemption to protect the "religious freedom of any person or group" from animal slaughter laws, *see* OHIO REV. CODE ANN. § 945.02;

- Exemption for those whose "religion prohibits the person from obtaining a license" from Ohio's milk license requirements, *see* OHIO REV. CODE ANN. § 917.09(I);

- Accommodation of religious exercise in city jails and workhouses by requiring "provi[sion] of religious services therein each week" and permitting employment of "a clergyman or religious organization to conduct such services," *see* OHIO REV. CODE ANN. § 753.18.

(7)

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IN THE
Supreme Court of the United States

Jon B. Cutter, et al.,

Petitioners,

v.

Reginald Wilkinson, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF AMICI CURIAE SENATORS ORRIN G. HATCH AND EDWARD M. KENNEDY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amicus Orrin G. Hatch, Chairman of the Senate Committee on the Judiciary, has been a United States Senator for 28 years, and has served on the Committee for that entire period, including three times as Chairman. Amicus Edward M. Kennedy has been a United States Senator for 42 years, during which time he has continuously served on the Committee on the Judiciary, including as Chairman from 1979-1981.

Both amici have been ardent defenders of religious liberty throughout their tenure in the Senate. They were sponsors of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, and were the two principal Senate sponsors of the statute that is challenged in this case, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803, 42 U.S.C. §§ 2000cc, *et seq.* *See* Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7774-76 (daily ed. July 27, 2000) ("Joint Statement").

Although amici have a great interest in the Establishment Clause question on which this Court granted certiorari, that question is effectively addressed in the briefs of petitioners, the United States, and other amici. In this brief, amici will address the questions of congressional power that the respondents have announced they will ask this Court to resolve—questions concerning which the amici have long experience and considerable interest.

INTRODUCTION

Following this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress overwhelmingly passed RFRA, which as originally enacted prohibited *any* government

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amici curiae state that no counsel for a party authored any part of this brief, and no person or entity, other than amici curiae and their counsel, made a monetary contribution to the preparation or submission of this brief.

within the United States from "substantially burden[ing]" a person's exercise of religion, unless the government could demonstrate that imposing the burden was "in furtherance of a compelling governmental interest" and was "the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000bb-1.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court held that Congress lacked the power under section 5 of the Fourteenth Amendment to apply RFRA to state and local governments. *City of Boerne* did not affect the application of RFRA to the federal government. Thus, for more than a decade, RFRA has modified *all* federal law, statutory or otherwise, *see* 42 U.S.C. §§ 2000bb-3(a), 2000bb-2(1)-(2)—including the administration of all laws within the federal prison system, where application of RFRA remains both constitutional and manageable (as the federal government concedes).[2]

Following *City of Boerne*, Congress and the President gave long and careful consideration to that decision and to other recent decisions of this Court respecting congressional power and religious liberty. Congress held nine hearings, in which numerous witnesses addressed in great detail both the need for religious liberty legislation, and the constitutional limits of Congress's powers to address the problem at the state and local level. The congressional sponsors of RLUIPA worked very closely with the Department of Justice to carefully craft a statute that comports with this Court's doctrines respecting the First Amendment and Congress's enumerated powers.[3]

In 2000, Congress without recorded dissent enacted RLUIPA, which is a much more circumscribed and targeted statute than RFRA. It does not apply to *all* state and local law. Instead, RLUIPA's substantive provisions address two discrete contexts in which Congress found that state and local

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[2] *See, e.g., O'Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003); 146 Cong. Rec. at S7776 (Letter from Assistant Attorney General Robert Raben to the Hon. Orrin Hatch (July 19, 2000)) ("Raben Letter").

[3] *See* Raben Letter, *supra*.

governments often impose unwarranted and substantial burdens on religious exercise. RLUIPA section 2, which is not at issue here, protects the exercise of religion against certain substantial burdens, discriminations and exclusions imposed by zoning and landmark laws. Section 3, the statutory provision at issue in this case, protects the rights of institutionalized persons to exercise their religion free from substantial burdens imposed by "frivolous or arbitrary" governmental restrictions. Joint Statement, 146 Cong. Rec. at S7775.

Specifically, section 3(a) provides that no government shall impose a substantial burden on the religious exercise of a person "residing in or confined to an institution," unless the government demonstrates that imposition of the burden on that person is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a).[4]

RLUIPA section 3(b), *id.* § 2000cc-1(b) specifies that section 3(a)'s substantive rule applies *only* where at least one of two prerequisites is met:

First, invoking its power under the *Spending Clause*, U.S. Const. art. I, § 8, cl. 1, Congress provided in section 3(b)(1) that the substantive limitation on state action in section 3(a) applies where the substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). Section 8(6) of RLUIPA, 42 U.S.C. § 2000cc-5(6), specifically incorporates by reference the definition of "program or activity" used in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-4(a), pursuant to which the phrase includes "all of the operations of" certain entities, including "a department, agency, special purpose district, or other instrumentality of a State or of a local government."

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[4] Section 3(a) incorporates by reference the definition of "institution" found in 42 U.S.C. § 1997, which includes certain state-owned, operated and managed facilities and institutions, including, inter alia, prisons and other correctional facilities; facilities for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped; and institutions providing skilled nursing, intermediate, long-term, custodial or residential care.

Second, invoking its power under the *Commerce Clause*, U.S. Const. art. I, § 8, cl. 3, Congress provided in section 3(b)(2) that the substantive limitation on state action found in section 3(a) applies where a plaintiff demonstrates that the substantial burden on religious exercise "affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2). However, Congress also added a unique affirmative defense for the benefit of a state or local RLUIPA defendant. Pursuant to that provision, the Commerce Clause subsection shall not apply if the government can demonstrate that alleviating all substantial burdens from "similar" religious exercise across the nation would not, in the aggregate, lead to a *substantial* effect on interstate, foreign or Indian commerce. RLUIPA section 4(g), 42 U.S.C. § 2000cc-2(g).

SUMMARY OF ARGUMENT

If this Court chooses to consider the alternative arguments for affirmance that the Ohio respondents have indicated they will present, it should hold that Congress was authorized to enact RLUIPA section 3 under both its Spending Clause and Commerce Clause powers.

I. The Spending Clause provisions of RLUIPA section 3 impose *general* conditions upon recipients of federal funds—conditions that apply across a wide array of federal expenditures. This Court has upheld similar "cross-cutting" funding conditions in cases such as *Oklahoma v. U.S. Civil Service Comm'n*, 330 U.S. 127 (1947), and *Lau v. Nichols*, 414 U.S. 563 (1974). The particular agency-wide scope of RLUIPA section 3's coverage derives from a series of important civil rights laws (including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973) that impose restrictions on all of the operations of a particular state agency that receives federal aid. Like those statutes, however, section 3 does not apply to a state agency operating prisons merely because the State as a whole, or some other state agency, receives federal aid.

Section 3 satisfies all possible requirements for permissible exercise of the conditional spending power. The condition it imposes on public agencies serves the general welfare by facilitating religious exercise in an environment where such fundamental freedom is commonly constrained. It is well-tailored to the government's interest in not permitting its subsidies to be used in any way to facilitate or subsidize unnecessary burdens on religious freedom. Section 3 moreover provides States with clear notice of the standards of conduct by which an agency must abide if it receives federal funds. Section 3 does not induce state recipients of aid to violate the constitutional rights of others. And the financial inducement offered by Congress to States (and to the Ohio Department of Rehabilitation and Corrections ("ODRC"), in particular) is not so "coercive" as to pass the point at which "pressure turns into compulsion."

II. The Commerce Clause provisions of section 3 are also a permissible exercise of Congress's article I powers.

A. RLUIPA subsection 3(b)(2) incorporates a "jurisdictional element" that requires proof of an effect upon interstate, foreign or Indian commerce in every case. Such an element is common to many important federal statutes, including the Hobbs Act, the constitutionality of which this Court has upheld. This Court has repeatedly acknowledged that such an "affects commerce" element is a means by which Congress may invoke its full authority under the Commerce Clause. Such an element ensures *facial* compliance with the Commerce Clause by limiting the statute's reach to a discrete set of cases that have an explicit and concrete connection with or effect upon interstate commerce—in contrast to the provisions this Court declared invalid in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), both of which lacked such a jurisdictional element. Indeed, RLUIPA goes one significant step beyond what is necessary to ensure its constitutionality: It contains a unique affirmative defense for the benefit of state or local RLUIPA defendants, which forecloses application under section 3's Commerce Clause subsection if the government demonstrates that alleviating all substantial burdens

from "similar" religious exercise would not, in the aggregate, *substantially* affect interstate, foreign or Indian commerce.

In all events, RLUIPA is plainly constitutional as applied to a discrete class of claims at issue in these cases, involving requests for religious items that plaintiffs allege can only be obtained through interstate commercial transactions: prohibiting prisoners from obtaining these items quite literally prevents specific transactions in interstate commerce.

B. The prohibitory commands of the commerce provisions of section 3 do not violate this Court's "anti-commandeering" doctrine. Those provisions do not require States to enact any laws or regulations or to assist in the enforcement of *federal* statutes regulating private individuals; and they do not "*require* the States in their sovereign capacity to regulate their own citizens." *Reno v. Condon*, 528 U.S. 141, 151 (2000) (emphasis added). A contrary holding would implicate numerous federal laws specifically limiting state regulation, including many deregulatory preemption statutes and doctrines.

ARGUMENT

Amici agree with petitioners and with the United States that section 3 of RLUIPA does not violate the Establishment Clause, because it alleviates substantial, government-imposed burdens on religious exercise without imposing significant burdens on other private parties. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).[5] Respondents have indicated (Br. in Resp. 14-20)

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[5] Respondents contend that some RLUIPA accommodations will endanger the safety of prison guards and fellow prisoners. Br. in Resp. 12. Even if that assumption were correct, the mere possibility of such as-applied problems cannot possibly be grounds for invalidating section 3 on its face. In any event, the assumption is mistaken, for two reasons: First, RLUIPA does not appear to impose upon Ohio prison officials any requirements of religious accommodation greater than those the Ohio Constitution already imposes of its own force. *See Humphrey v. Lane*, 728 N.E.2d 1039, 1043, 1045 (Ohio 2000). Accordingly, it is unlikely that RLUIPA would be the source of any of the risks that respondents identify. Second, even assuming arguendo

that they will ask this Court to consider whether the Spending and Commerce Clauses authorized Congress to enact section 3, in the event this Court holds that section 3 does not facially violate the Establishment Clause. The Court should decline that invitation.

The court of appeals based its decision solely upon the Establishment Clause and did not consider the questions of congressional power (Pet. App. A at 8). This Court "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996)—a practice the Court has followed in cases where it has reversed a lower court's judgment declaring a federal statute invalid, where alternative grounds for invalidation had not been addressed below. *See, e.g., Pierce County v. Guillen*, 537 U.S. 129, 148 n.10 (2003); *Ashcroft v. ACLU*, 535 U.S. 564, 585-86 (2002).

Nor are the questions of congressional power independently worthy of this Court's review at this time. The three courts of appeals to have opined on the matter have held that RLUIPA section 3 is permissible Spending Clause legislation,[6] and therefore neither they, nor any other court of appeals, has had

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that a RLUIPA accommodation *would* result in an additional, serious safety risk, state defendants in such a case would be able to prevail quite easily as a statutory matter, because in determining whether a state institution has a narrowly tailored, compelling justification for denying the requested exemption, courts should "'continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" Joint Statement, 146 Cong. Rec. at S7775 (quoting RFRA Senate Report, S. Rep. No. 103-111, at 10 (1993)).

[6] *Mayweathers v. Newland*, 314 F.3d 1062, 1066-68 (9th Cir. 2002), *cert. denied sub nom. Alameida v. Mayweathers*, 124 S. Ct. 66 (2003); *Charles v. Verhagen*, 348 F.3d 601, 606-10 (7th Cir. 2003); *Benning v. Georgia*, No. 04-10979, 2004 WL 2749172, at *3-*7 (11th Cir. Dec. 2, 2004).

reason to address Congress's authority to impose section 3 directly under the Commerce Clause.

However, if the Court does address questions of Congress's authority to enact section 3, it should hold that section 3 is a proper exercise of Congress's enumerated article I powers.

I. The Spending Clause Authorizes RLUIPA Sections 3(a) and 3(b)(1).

Pursuant to its power to "provide for the common Defence and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, Congress has "wide latitude" to impose conditions on States' receipt of federal funds, *United States v. American Library Ass'n*, 539 U.S. 194, 203 (2003) (plurality opinion), even where such conditions influence a State to act in a way that Congress could not directly compel absent the funding condition. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *New York v. United States*, 505 U.S. 144, 167, 171-73 (1992).

RLUIPA itself does not authorize any federal funding. Instead, RLUIPA section 3(a), as applied by section 3(b)(1), establishes a cross-cutting, or background, condition that applies to the receipt of *all* federal funds by a particular state agency, a condition intended to ensure that federal monies are not used to subsidize, or facilitate, certain disfavored conduct—in this case, unnecessary governmental imposition of substantial burdens on religious exercise. This Court has long upheld Congress's power to enact laws imposing such cross-cutting funding conditions. *E.g.*, *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947); *Lau v. Nichols*, 414 U.S. 563 (1974).[7]

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[7] *See also Board of Educ. of Westside Community Schools v. Mergens ex rel. Mergens*, 496 U.S. 226, 241 (1990) (requirement of Equal Access Act, 20 U.S.C. § 4071(a), that public secondary schools that receive any federal financial assistance cannot engage in certain forms of discrimination with respect to "noncurriculum-related" student groups, "is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups"). Last Term, in *Sabri v. United States*, 124 S. Ct. 1941 (2004), this Court broadly upheld the constitutionality of 18 U.S.C. § 666—not directly on Spending Clause grounds, but on the basis of Congress's "corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under [the Spending] power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Id.* at 1946. The decision in *Sabri* suggests that cross-cutting spending-condition statutes such as section 3 of RLUIPA might also be fruitfully viewed through the lens of the Necessary and Proper Clause, which empowers Congress to employ "rational means" to safeguard congressionally preferred uses of federal dollars. *Id.*

In this regard, RLUIPA is specifically patterned upon four other important civil rights statutes: Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-4(a) (prohibiting discrimination on the basis of "race, color, or national origin" in "any program or activity receiving Federal financial assistance"); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681(a), 1687(1)(a) (barring discrimination on the basis of sex in any "education program or activity receiving Federal financial assistance"); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)-(b) (prohibiting discrimination on the basis of disability in "any program or activity receiving Federal financial assistance"); and the Age Discrimination Act of 1975, 42 U.S.C. §§ 6102, 6107(4) (proscribing age discrimination under "any program or activity receiving Federal financial assistance").[8]

The upshot of each of these statutes is that if a state chooses to permit one of its agencies or departments to receive federal aid, the state thereby knowingly consents to the requirement that, in *all* of the operations *of that particular agency*, state conduct is constrained by (at least) the restrictions on conduct contained in these five statutes.[9]

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[8] Similarly, the Equal Access Act, 20 U.S.C. § 4071(a), applies its condition to "secondary schools" receiving any federal assistance. *See* note 7, *supra*.

[9] In the case of RLUIPA, the funding condition does not apply to all state agencies that receive federal aid, because by its terms it applies only to those agencies or departments that house or confine persons in a statutorily specified institution. *See supra* at 3 & note 4.

RLUIPA--like the civil-rights statutes on which it is modeled—satisfies this Court's requirements for the permissible exercise of Congress's conditional spending power.

1. *General Welfare*. Even if the express "general Welfare" requirement of the Spending Clause is judicially enforceable, *but see Dole*, 483 U.S. at 207 n.2, it is plainly satisfied here: RLUIPA section 3 furthers the general welfare by alleviating substantial, unwarranted government-imposed burdens on individuals' religious exercise in settings where the exercise of the fundamental human freedom to worship or exercise faith is often severely constrained—namely, in state-run institutions, including prisons.

2. *Relatedness*. This Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207 (citation omitted). RLUIPA exemplifies Congress's power to specify the conditions under which recipients can spend federal money. Just as Congress has an important interest in assuring that none of its funds are "'spent in any fashion which encourages, entrenches, subsidizes, or results in'" discrimination, *Lau*, 414 U.S. at 569 (quoting Sen. Humphrey), or on partisan political activity, *see Oklahoma v. CSC*, 330 U.S. at 143, so, too, "Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion." *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), *cert. denied sub nom. Alameida v. Mayweathers*, 124 S. Ct. 66 (2003).

Respondents have argued that the condition RLUIPA imposes is "unrelated 'to the federal interest in *particular* national projects or programs,' " *Dole*, 483 U.S. at 207, because RLUIPA does not require any *direct* connection between its restrictions and any specific funding streams that ODRC receives—for example, none of ODRC's federal funds "have any relation to religion" or to prisoners' religious rights. Defendants'-Appellants' Final Opening Br. (6th Cir.) ("Def. CTA6 Br.") 37-41. This argument misapprehends the nature of

the federal interests at stake when Congress imposes cross-cutting funding conditions—and prohibitory conditions on receipt of federal funds in general. When Congress insists upon such conditions in a statute such as RLUIPA (or Title VI, Title IX, the Equal Access Act, etc.), it announces a federal interest that follows with each federal dollar spent. Such conditions generally are designed, not so much to advance or complement the objectives of a *particular* federal spending program, but instead, as a permissible means of broadly controlling how federal moneys are to be expended. Whatever federal interests a particular funding program might otherwise serve, the condition imposed by RLUIPA (or a similar statute) *also* serves the federal interest in avoiding the use of federal funds to subsidize the imposition of substantial, unjustified burdens on religious exercise.[10]

To require a nexus between the "subject-matter" of a funding statute and every cross-cutting funding condition, as a matter of constitutional law, would make little sense. Where Congress does not wish to subsidize disfavored state conduct—be it burdens on religious exercise, discrimination on the basis of race, sex, or disability, or whatever else—there is no reason to read the Constitution to require Congress to do so. This is true whatever the "principal" purpose of any particular federal funding stream might be.

Respondents have also argued that the breadth of RLUIPA's "program or activity" definition—which, like the cognate provisions in Title VI, the Rehabilitation Act, etc., extends to all of the operations of a recipient state agency—is too broad to pass constitutional muster. Def. CTA6 Br. 41-45. As explained above, however, the condition at issue here is limited to those agencies in which the State has decided to receive federal funds. This line of demarcation is a reasonable

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[10] In other words, such a cross-cutting condition achieves precisely the same result as if Congress attached the "prohibitory" condition (*e.g.*, "do not discriminate on the basis of disability") to each and every disparate funding statute. Nothing in the Constitution requires Congress to act in such a piecemeal fashion.

one for Congress to draw, because as this Court recognized last term in addressing a similar broad nexus test in *Sabri v. United States*, 124 S. Ct. 1941, 1946 (2004), money is fungible: Thus, financial aid to a particular state agency generally will be functionally indistinguishable from—and will "free up"—other funds within that agency's budget,[11] and will make it difficult for the federal government to track exactly where federal money ends up, and what it subsidizes, within an institution or agency. These problems are especially acute in the case of general aid and "block grants," such as the State Criminal Alien Assistance Program grants that the ODRC receives, J.A. 320-21, in which federal aid is authorized for a wide range of activities within a broadly defined functional area, with recipients having substantial discretion where to allocate resources. Such assistance inevitably has economic "ripple effects" throughout the agency and the use of it cannot be effectively traced. Thus, it makes perfect sense for Congress to impose spending conditions on all of the funds delivered to the state agency or department.

Citing this Court's decisions in *FCC v. League of Women Voters* ("*LWV*"), 468 U.S. 364, 399-401 (1984), and *Rust v. Sullivan*, 500 U.S. 173, 196-199 (1991), respondents argued in the court of appeals that the coverage of RLUIPA section 3(a) creates a sort of "unconstitutional condition," barring a funding recipient from using even *wholly nonfederal funds* to finance activities prohibited by the funding condition. Def. CTA6 Br. 41-45. But *Rust* and *LWV* each involved the First Amendment rights of *private* parties, and little, if any, application to the

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[11] *See, e.g., Civil Rights Restoration Act of 1987: Hearings Before the Senate Comm. on Labor & Human Resources*, 100th Cong., 1st Sess. 321-22 (1987) (David S. Tatel, former Director of Health, Education and Welfare Department's Office for Civil Rights) ("[t]here is absolutely no reason why a person who is discriminated against in . . . the program which has more local funds because of the receipt of federal financial assistance elsewhere in the institution . . . should receive any less protection than the person discriminated against in the program or activity directly receiving the federal financial assistance").

question whether Congress has properly imposed a condition on a *state entity*'s receipt of federal funds.[12]

In any event, even if the inapposite unconstitutional conditions doctrine of *LWV* and *Rust* applied with full force in this context, RLUIPA would be fully consistent with those decisions. In those cases, the Court explained that although Congress may not flatly prohibit a private funding recipient from using nonfederal funds to engage in unauthorized expression—even as a prophylactic rule in the service of protecting the use of the federal funds, *see LWV*, 468 U.S. at 400—Congress may require the funding recipient to guarantee a strict degree of separation between funded and unfunded activities in order to ensure that the federal funds do not subsidize the disfavored speech. Congress may, for example, require the recipient to form an affiliate organization—which must be kept "physically and financially separate" from the organization that receives federal funds, *Rust*, 500 U.S. at 180, 187-190—to receive and spend money from nonfederal sources to engage in the expressive activities that Congress disfavors.[13]

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[12] This Court has repeatedly noted that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take," *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666, 686 (1999)—an unqualified proposition that would be strikingly out of place in the context of the First Amendment. Indeed, in *LWV* itself, the Court carefully distinguished the First Amendment unconstitutional conditions doctrine from the more deferential scrutiny that the Court applies in cases involving conditions placed on *public* recipients of federal funds. 468 U.S. at 401 n.27 (distinguishing *Oklahoma v. CSC*).

[13] In *Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307 (2004), the Court went so far as to approve an analogous segregation requirement as applied to an *individual*'s choice of undergraduate studies. The Court held that the State of Washington not only could decline to permit its scholarships to be used for the study of devotional theology, but also that if students wished to pay for such devotional studies with *non-scholarship* funds, the State could require them to "use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology." *Id.* at 1313 n.4.

RLUIPA (and the conditional-spending statutes on which it is patterned) is cut from the same conceptual cloth: By imposing funding conditions on all of the operations of a state *agency* that receives any federal funds, Congress has elected to draw the line of coverage according to each State's own chosen governmental structure. States may thus engage in any operations they wish free of the conditions imposed by, *e.g.*, RLUIPA and section 504 of the Rehabilitation Act, by segregating those functions—or even, in the context of RLUIPA, by segregating particular prisons and other institutions—in agencies or departments for which the State declines to accept federal funding. "The State is accordingly not required to renounce all federal funding to shield chosen state agencies from compliance with [the condition]." *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir.) (en banc), *cert. denied sub nom. Arkansas Dept. of Educ. v. Jim C.*, 533 U.S. 949 (2001). To be sure, such segregation might well be costly and inconvenient. But that option is certainly no more untenable—and, more importantly, is far less constitutionally worrisome—than the option of a private health-care organization to establish a separate and independent affiliate in which it can discuss abortion (*Rust*), or the opportunity of an undergraduate student to attend two colleges simultaneously in order to retain scholarship eligibility and still continue to work toward dual majors (*Locke*).[14]

[14] It has been suggested that the Court's recent "tolerance for such prophylactic rules"—such as permitting a stringent *Rust*-like segregation requirement in *Locke*—in the context of individuals' exercise of constitutional rights, threatens to undermine the unconstitutional conditions doctrine by "swallowing the rule against penalizing a constitutionally protected activity by withholding other related benefits." Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes But Missing The Liberty*, 118 Harv. L. Rev. 155, 181 (2004). Whether or not that is so, there should be no need for similar concern in the context of segregation requirements imposed on *state* recipients of federal funding. *Id.* at 182-183.

3. *Notice.* Congress must provide the States "'unambiguous[]'" notice of funding conditions, so as to "'enabl[e] the States to exercise their choice [to receive such funding] knowingly, cognizant of the consequences of their participation.'" *Dole*, 483 U.S. at 407 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). RLUIPA is crystal clear in informing States that section 3(a)'s substantive restriction applies to *all* of the operations of a state agency such as ODRC if that agency receives *any* federal financial assistance. *See supra* at 3. Accordingly, courts of appeals have uniformly and correctly concluded that RLUIPA satisfies the *Pennhurst* plain-notice requirement.[15]

In the lower courts, some states (but not Ohio), have argued that RLUIPA's substantive requirement—in particular, its "least restrictive means" test—is too amorphous to give States sufficient notice of what federal law requires when they accept federal funds. These states have relied on this Court's statement in *Pennhurst*, 451 U.S. at 24, that a "least restrictive setting" standard in a different statute was "largely indeterminate." That argument misses the mark for at least two reasons. For one, RLUIPA's "least restrictive means" standard is a familiar one in the area of religious exercise,[16] and Ohio, in particular, can hardly be heard to complain about it, because it is by terms the same standard that the Ohio Constitution prescribes to govern the conduct of the prison officials who are defendants here. *See Humphrey v. Lane*, 728 N.E.2d 1039, 1043, 1045 (Ohio 2000).

Moreover, the argument misreads *Pennhurst*. That case raised the question whether Congress intended the "least restrictive setting" provision of the Developmentally Disabled Assistance and Bill of Rights Act to be a funding condition that

[15] *See Mayweathers*, 314 F.3d at 1067; *Charles*, 348 F.3d at 607-608; *Benning*, 2004 WL 2749172, at *4-*5.

[16] *See Employment Div. v. Smith*, 494 U.S. at 899 (O'Connor, J., concurring in the judgment) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)); *see also Benning*, 2004 WL 2749172, at *4 ("RLUIPA gives states wide latitude in applying its provisions, but this flexibility does not make the conditions of RLUIPA opaque.").

was binding on the States at all. Given the open-endedness of that standard, the Court concluded that States would be surprised to learn that it was binding upon them; the canon that Congress must "express clearly its intent" to impose such a condition on the grant of federal funds therefore applied "with greatest force." 451 U.S. at 24. The Court explained that if Congress *had* "spoke[n] so clearly that we can fairly say that the State could make an informed choice," then "by accepting funds under the Act, [States] would indeed be obligated to comply with" the standard, notwithstanding its apparent indeterminacy. *Id.* at 25.

More recently, this Court has held that Title IX provides school districts that receive federal funds sufficient notice of their obligations regarding student-on-student sexual harassment, even though those obligations are framed in open-ended and highly context-dependent terms: A funding recipient must avoid being "deliberately indifferent to [student-on-student] sexual harassment, of which they have actual knowledge," that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650-651 (1999). As *Davis* demonstrates, and as one court of appeals reviewing RLUIPA section 3 has explained, "Congress is not required to list every factual instance in which a state will fail to comply with a condition. Such specificity would prove too onerous, and perhaps, impossible." *Mayweathers*, 314 F.3d at 1067; *see also Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985). All the Constitution requires is that the law "make the existence of the condition itself—in exchange for the receipt of federal funds—explicitly obvious." *Mayweathers*, 314 F.3d at 1067. Congress has done so in RLUIPA.

4. *Inducing Unconstitutional State Conduct.* Federal funding conditions must not induce recipient States to violate the Constitution. *Dole*, 483 U.S. at 207-210; *see also American Library Ass'n*, 539 U.S. at 203 (plurality opinion). RLUIPA section 3 does not do so. Indeed, if in a particular case a prison

official would violate someone else's constitutional rights by granting a requested religious accommodation—such as, for example, by granting content-based preferences for prisoners' religious expression in a manner that the Free Speech, Press or Assembly Clauses of the First Amendment would forbid[17]—then the avoidance of that constitutional violation would itself be a "compelling interest" that would, under RLUIPA's own *statutory* standard, justify denial of the accommodation (at least in the form it was requested). By its terms, then, RLUIPA cannot fairly be construed to induce state officials to violate constitutional rights of others.

5. *Coercion.* The Court noted in *Dole* that one of its prior decisions had "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). The Court reiterated, however, the skeptical caution of that earlier case that if there is such a metaphysical point at which "pressure turns into compulsion," it is unlikely that the judiciary is capable of discerning it: "'[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.'" *Id.* (quoting *Steward Machine*, 301 U.S. at 589-590).

Understandably, then, this Court has never held that a funding condition applied to state recipients of aid was unduly coercive. But be that as it may—and even if it were theoretically possible for courts to discern a constitutional distinction between pressure and compulsion in the context of governmental budgetary choices—this case does not raise any serious question of undue coercion. In the district court, Ohio represented that federal funds comprise less than one percent of

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[17] *See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-653 (1981); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (White, J., concurring in the judgment).

the ODRC's total budget. Reply Memorandum [on Motion to Dismiss] 17. Amici do not mean to suggest that a condition attached to federal aid comprising a more substantial portion of a state agency budget would be constitutionally suspect—to the contrary, this Court has indicated that such a condition can be constitutional even where it would be an "unrealistic option" for the state entity to forego the federal funding. *Board of Educ. of Westside Community Schools v. Mergens ex rel. Mergens*, 496 U.S. 226, 241 (1990). But if that is so, then surely Congress has not impermissibly "coerced" Ohio to accept the terms of RLUIPA within the operations of the ODRC merely because the cost of avoiding such restrictions would be the loss of a minuscule percentage of the agency's funding.

II. The Commerce Clause Authorizes RLUIPA Sections 3(a) and 3(b)(2).

In virtually every case litigated under RLUIPA section 3, the Commerce Clause provisions will be superfluous. An institution that houses or confines a section 3 plaintiff will almost certainly be operated by a department, agency, special purpose district, or other instrumentality of a State or of a local government that receives federal financial assistance, and proof of such federal assistance will be uncontested or easily obtainable. The Spending Clause subsection of RLUIPA therefore will be operative, and there will be no need for a plaintiff to rely upon the "affecting commerce" subsection. Accordingly, unless this Court were *both* to reverse the court of appeals on the Establishment Clause question, *and* to determine that Congress lacked the authority to enact the Spending provision (3(b)(1)), there almost certainly will never be an occasion for this Court to assess the constitutionality of subsection 3(b)(2). *See, e.g.*, *Guillen*, 537 U.S. at 147 n.9. In any event, the Court would not need to reach that question in *this* case, where the parties have stipulated that the spending provision of RLUIPA applies to ODRC—as do, e.g., Title VI, the Rehabilitation Act, etc.—because ODRC regularly receives federal financial assistance from dozens of different sources.

J.A. 319-22; Defs.' Consol. Memo in Support of Motion to Dismiss (D. Ct.) at 24 n.40.

If this Court does address the Commerce Clause question, however, it should confirm that Congress had the authority to enact subsection 3(b)(2), which incorporates a jurisdictional element that is common to many important federal statutes and that this Court has long approved.

A. The "Affecting Commerce" Jurisdictional Element Guarantees That the Commerce Provisions of RLUIPA Section 3 Are Constitutional.

1. Section 3(b)(2) provides that the substantive limitation on burdening religious exercise in RLUIPA section 3(a) applies where the government's substantial burden on religious exercise affects, or where removal of that substantial burden would affect, interstate, foreign or Indian commerce. *See supra* at 4. Such an "affects commerce" element is a familiar feature of the United States Code. Most famously, the Hobbs Act, 18 U.S.C. § 1951(a), prohibits actual and attempted robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." This Court held almost half a century ago that the standard set by this "affects commerce" element of the offense is constitutional, because "racketeering affecting interstate commerce [i]s within federal legislative control." *United States v. Green*, 350 U.S. 415, 420-21 (1956). The Court thereafter confirmed that the "broad language" of this element "manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215 (1960).

Nothing in the Court's subsequent decisions has called into question the facial constitutionality of the Hobbs Act.[18] To the

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[18] Thus, even after this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), federal courts of appeals have regularly confirmed that the Hobbs Act is facially constitutional, and distinguishable from the statutes at issue in *Lopez* and *Morrison*, because of the "affects

contrary, since *Stirone* the Court has repeatedly noted that such an "affects commerce" element signals Congress's intent to invoke its full authority under the Commerce Clause. *See, e.g.*, *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 408 (2003); *Jones v. United States*, 529 U.S. 848, 854 (2000); *United States v. Culbert*, 435 U.S. 371, 373 (1978); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (per curiam). Heeding that signal, Congress has commonly employed an "affecting [interstate] commerce" element in its enactments in order to ensure their constitutionality—in more than 100 instances, by Justice Breyer's count. *See United States v. Lopez*, 514 U.S. 549, 630 (1995) (Breyer, J., dissenting).

Importantly, many of these "affecting commerce" statutes regulate conduct that almost certainly would not be deemed "commercial" or "economic" for Commerce Clause purposes *but for* the effect on commerce that the law itself requires to be proved in each case. For example, Congress has: prohibited the possession "in or affecting interstate or foreign commerce" of certain biological weapons (18 U.S.C. § 175b(a)(1)) and ballistic knives (15 U.S.C. § 1245(a)); made it unlawful for certain persons, such as felons and drug users, to possess any firearm or ammunition "in or affecting commerce" (18 U.S.C. § 922(g); *see also id.* § 842(i) (similar prohibition with respect to explosives)); made it unlawful to intentionally deface, damage, or destroy any religious real property because of the religious character of that property, or to intentionally obstruct, by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs, where the conduct "is in or affects interstate or foreign commerce" (18 U.S.C. § 247(a)-(b)); and prohibited the use (or threatened use), without lawful authority, of a weapon of mass destruction—including a biological agent, toxin, or vector—against any person in the

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commerce" element. *See, e.g.*, *United States v. Capozzi*, 347 F.3d 327, 335-336 (1st Cir. 2003), *cert. denied*, 124 S. Ct. 1187 (2004), and cases cited therein; *United States v. Valenzeno*, 123 F.3d 365, 367-368 (6th Cir. 1997); *United States v. Robinson*, 119 F.3d 1205, 1212-1214 (5th Cir. 1997), *cert. denied*, 522 U.S. 1139 (1998).

United States, where the results of such use affect (or, in the case of a threatened use, would have affected) interstate or foreign commerce (18 U.S.C. § 2332a(a)(2)).[19]

In many other statutes, Congress has gone further still, prohibiting certain conduct upon proof, *not* that the regulated conduct itself affects commerce, but merely that the conduct has some specified relation to a group or enterprise that itself affects interstate commerce. So, for example, the Racketeer Influenced and Corrupt Organizations Act ("RICO") makes it unlawful, inter alia, for a person to participate in the conduct of an enterprise's affairs through a "pattern of racketeering activity"—which can consist exclusively of violent acts such as murder and kidnapping, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256-257 & n.4 (1994)—if the *enterprise*'s activities (not necessarily the wrongdoer's) affect interstate or foreign commerce. 18 U.S.C. § 1962(c). This Court has addressed § 1962(c) of RICO numerous times (and has even held that the enterprise need not have an economic motive—only an effect on interstate commerce—*National Org. for Women*, 510 U.S. at 256-262); but the Court has never so much as hinted that there might be something constitutionally dubious about the fact that culpability turns on an attenuated, mediated nexus between the defendant's noneconomic, violent conduct and the interstate commerce affected by the conduit enterprise.[20]

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[19] *See also, e.g.*, 18 U.S.C. § 844(e) (prohibiting the making of a willful threat of, or maliciously conveying knowingly false information concerning, violent acts, where the threat or transmission of information is "in or affecting interstate or foreign commerce").

[20] For other statutes requiring proof of a similar sort of attenuated nexus between the regulated conduct and the effect on interstate commerce, *see, e.g.*, 18 U.S.C. § 1959 (prohibiting the use of violent conduct for the purpose of maintaining or increasing position in an enterprise that is engaged in racketeering and the activities of which affect interstate or foreign commerce); *id.* § 521(d)(2) (increasing penalties for specified federal offenses where the defendant had the intent to promote or further the felonious activities of a criminal street gang or to maintain or increase his or her position in the gang, where "criminal street gang" is defined to mean, inter alia, an ongoing group

Courts have not seriously questioned the facial validity of any of these statutes containing an "affects commerce" jurisdictional element. Nor is enactment of such statutes inconsistent with this Court's recent Commerce Clause decisions in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000). In both of these cases, the Court specifically emphasized that the statutes at issue required no proof of any nexus between the proscribed conduct and interstate commerce in each case. *Id.* at 613; *Lopez*, 514 U.S. at 561-562. The *Lopez* Court indicated that the presence of such a jurisdictional nexus would help meet its constitutional concerns, because such an "express jurisdictional element" "might limit [the statute's] reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562; *accord Morrison*, 529 U.S. at 611-612; *see also id.* at 613 ("Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that [the provision at issue in *Morrison*] is sufficiently tied to interstate commerce, Congress elected to cast [the provision's] remedy over a wider, and more purely intrastate, body of violent crime.").[21]

In sharp contrast to the statutes at issue in *Lopez* and *Morrison*, RLUIPA *does* contain a "jurisdictional element"—indeed, the very element that is, when unqualified, the way in

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or club the activities of which affect interstate or foreign commerce); *id.* § 668 (prohibiting theft of objects of cultural heritage from a "museum," defined as an organized and permanent institution established for an essentially educational or aesthetic purpose and the activities of which affect interstate or foreign commerce).

[21] Notably, the Court in *Lopez* specifically referred to the "affecting commerce" element of the "felon-in-possession" statute (the current version of which is found at 18 U.S.C. § 922(g)), which the Court had previously considered at length in *United States v. Bass*, 404 U.S. 336 (1971), and *Scarborough v. United States*, 431 U.S. 563 (1977). As the Court explained in *Lopez*, 514 U.S. at 561-562, *Bass* construed the possession component of that statute "to require an additional nexus to interstate commerce," precisely in order to guarantee that Congress "'will not be deemed to have significantly changed the federal-state balance'" (quoting *Bass*, 404 U.S. at 349).

which Congress ordinarily invokes its "full authority under the Commerce Clause." *Jones*, 529 U.S. at 854.

To be sure, the Court in *Morrison* "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617. But that holding does not affect the constitutionality of RLUIPA, for at least two reasons. First, even if Congress's authority to enact RLUIPA section 3 *were* "based solely" on the "aggregate effect" of the regulated conduct on interstate commerce, that regulated conduct—the activities of state prisoners and prison officials—does not constitute "violent criminal conduct," and the Court in *Morrison* expressly *declined* to "adopt a categorical rule against aggregating the effects of any noneconomic activity." *Id.* at 613.

More importantly, however, RLUIPA does not present the Court with the need to resolve any difficult questions about when Congress *may* act to address the aggregated effects of any noneconomic activity—nor any subsidiary, vexing questions about the permissible scope of "economic activity" for purposes of evaluating such aggregation—*see Ashcroft v. Raich*, No. 03-1454 (argued Nov. 29, 2004)—because the regulation of state-imposed substantial burdens on religious exercise in RLUIPA section 3 is *not* based "solely on that conduct's aggregate effect on interstate commerce." Instead, the "affect[ing] interstate commerce" element limits the statute's coverage to a "'discrete set of [acts] that . . . have an explicit connection with or effect on interstate commerce.'" *Morrison*, 529 U.S. at 611-612 (quoting *Lopez*, 514 U.S. at 562). Absent the jurisdictional element, there would be a risk that "a few random instances of interstate effects could be used to justify regulation of a multitude of intrastate transactions with no interstate effects." *United States v. Harrington*, 108 F.3d 1460, 1467 (D.C. Cir. 1997). But with the requirement of proof of an effect on interstate commerce in every case, there is no such concern: "each case stands alone on its evidence that a concrete and specific effect does exist," *id.*, and the inclusion of the element "addresses the *Lopez* Court's constitutional concern that congressional authority under the Commerce Clause not become a 'general police power of the

sort retained by the States,'" *United States v. Capozzi*, 347 F.3d 327, 336 (1st Cir. 2003) (quoting *Lopez*, 514 U.S. at 567), *cert. denied*, 124 S. Ct. 1187 (2004).

Therefore, the Commerce Clause provision of section 3, standing alone, would be permissible Commerce Clause legislation. But that provision does *not* stand alone. In contrast to other federal laws incorporating an "affects commerce" element, Congress added an affirmative defense for the benefit of state or local RLUIPA defendants, pursuant to which the Commerce Clause subsection shall not apply if the government can demonstrate that alleviating all substantial burdens from "similar" religious exercise would not, in the aggregate, lead to a *substantial* effect on interstate, foreign or Indian commerce. 42 U.S.C. § 2000cc-2(g). *See supra* at 4. For the reasons explained above, such an affirmative defense is not constitutionally *required*, because under a statute in which an "explicit" and "concrete" effect on interstate commerce must be proved in every case, there is no need to rely upon a "substantial effects" test to ensure that Congress is not regulating a multitude of "purely" intrastate transactions with no interstate connections or effects. But surely, if statutes such as the Hobbs Act are facially constitutional *without* such an affirmative defense, it follows that RLUIPA—in which Congress has bent over backward to include such a defense so as to accommodate local prerogatives and to ensure that each application has indisputably national effects—falls comfortably within the parameters of Congress's commerce power.

Of course, the fact that an "affects commerce" element implements Congress's full constitutional power does not mean that a statute including such an element is unlimited in effect. In some cases there may be a real question whether a particular type or quantum of proof is adequate to show the "explicit" and "concrete" effect on interstate or foreign commerce that the element requires. *See Harrington*, 108 F.3d at 1464, 1467 (citing *Lopez*, 514 U.S. at 562, 567).[22] The connections between

[22] *See, e.g., United States v. Wilkerson*, 361 F.3d 717, 726-732 (2d Cir.) (describing how the courts of appeals have engaged in careful, fact-specific review to determine under what circumstances the robbery of an individual affects interstate commerce for purposes of the Hobbs Act), *cert. denied*, 125 S. Ct. 225 (2004).

the activities regulated and interstate commerce cannot be "impermissibly attenuated." *Id.* at 1467. But such "as applied" issues do not change the fact that a statute requiring proof of such a jurisdictional element is *facially* constitutional.

2. Because this case reaches the Court on a motion to dismiss, it would be premature to consider whether the evidence as to each of the plaintiffs' various claims in the case would be sufficient to demonstrate the sort of concrete effect on interstate commerce that the RLUIPA jurisdictional element, and the Constitution, requires—not to mention whether Ohio would be able to satisfy RLUIPA's affirmative defense as to any or all such claims. There may be some claims where plaintiffs would be hard-pressed to demonstrate the requisite effect (*e.g.*, requests to be able to assemble for worship within a prison). But there is one category of claims that should satisfy the statutory standard, and pass "as applied" constitutional muster, in virtually every case. Some of the plaintiffs here have requested, among other things, that ODRC officials permit them to obtain religious books, ritual foods and other ritual items (*e.g.*, medallions, bowls, crystals, teas), and have alleged that some such items can be obtained only by commercial transactions with sources outside Ohio. *E.g.*, J.A. 265-66, 274, 277-78. If plaintiffs' allegations are true, then prohibiting prisoners from obtaining these items quite literally prevents specific transactions in interstate commerce, and alleviating the burden on religious exercise would result in an increase in such interstate transactions.

Proof that application of RLUIPA will result in some such interstate economic transactions obviously would satisfy the jurisdictional element, and would implicate the very core of the activity that Congress may constitutionally regulate—the sale or transfer of "things in interstate commerce," *Lopez*, 514 U.S. at 558, which is inarguably "a proper subject of congressional regulation." *Reno v. Condon*, 528 U.S. 141, 148 (2000); *see*

also id. (sale or release of article of commerce "into the interstate stream of business is sufficient to support congressional regulation"); *United States v. Thomas*, 159 F.3d 296, 297-298 (7th Cir. 1998), *cert. denied*, 527 U.S. 1023 (1999).[23] Accordingly, whatever else might be said about the constitutionality of sections 3(a) and 3(b)(2) with respect to claims alleging other sorts of effects on commerce, those provisions are per se constitutional as applied to the class of RLUIPA claims that would, if successful, necessarily result in

[23] Indeed, this Court has held that such an element can be satisfied—comfortably within constitutional limits—where the effect on interstate commerce is much more attenuated and speculative than would be the case with respect to the necessary interstate commercial transactions alleged here. In *Stirone*, for example, this Court affirmed a Hobbs Act conviction because the jury could have found that if the defendant's extortion there had been *resisted* (*i.e.*, had it been *un*successful), it may have hindered or destroyed the business, and thus interstate movements of sand to the victim "would have slackened or stopped." 361 U.S. at 215. The Court also has held that, under the federal statute prohibiting felons from possessing firearms in a manner "affecting commerce," the government may prove that the possession had the requisite effect on interstate commerce by showing that the firearm traveled in interstate commerce before the defendant obtained it (indeed, before the defendant committed the felony that triggered the restriction on possession). *Scarborough*, 431 U.S. at 571-572; *see also Lopez*, 514 U.S. at 561-562 (reaffirming the Court's decision in *Bass* that the jurisdictional element in the felon-in-possession statute ensures that it falls within Congress's commerce power). *Cf. Guillen*, 537 U.S. at 147 (federal statute requiring states to make certain hazardous-road reports inadmissible as evidence in state-court proceedings fell within Congress's Commerce Clause power to protect channels of commerce in light of the following possible causal chain: Requiring such an evidentiary rule would make it more difficult for would-be plaintiffs to obtain evidence to support negligence actions against state and local governments, which would in turn "result in more diligent [government] efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads").

actual interstate commercial transactions. *Cf. Tennesssee v. Lane*, 124 S. Ct. 1978, 1992-1993 (2004).

B. The Commerce Provisions of Section 3 Do Not Implicate This Court's Anti-Commandeering Doctrine.

In the Court of Appeals, respondents argued that the Commerce Clause provisions of RLUIPA section 3 violate principles of federalism reflected in the Tenth Amendment by impermissibly "commandeering" state governments. Def. CTA6 Br. 53-60. This argument fundamentally misconceives this Court's anti-commandeering decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997); it also ignores the numerous common, and constitutionally uncontroversial, contexts in which Congress limits the ability of states to regulate in a specific manner.[24]

In *New York* and *Printz*, this Court held that Congress had circumvented principles of federalism by requiring states to participate in the enforcement of federal law against private parties. The statutes at issue in those cases "conscript[ed] state governments" as "agents" of federal government, *New York*, 505 U.S. at 178; *see also Printz*, 521 U.S. at 935, in the implementation of federal regulatory schemes that addressed problems that the States had neither created nor exacerbated—in *New York*, by requiring states to impose restrictions on private parties or to bear the cost of remedying such parties' conduct, and in *Printz*, by requiring state officials to perform background checks necessary to the federal government's own enforcement of firearms laws against private actors.

RLUIPA section 3, in contrast with the statutes in *Printz* and *New York*—but in *common* with the statutes this Court upheld in *Reno v. Condon* and *South Carolina v. Baker*, 485

[24] The anti-commandeering argument is inapposite to RLUIPA section 3's *spending* provisions, as respondents conceded in the district court proceedings, Reply Mem. [in Support of Motion to Dismiss in Dist. Ct.] 24. *See New York*, 505 U.S. at 167, 171-73; *Printz*, 521 U.S. at 936 (O'Connor, J., concurring); *see also Mayweathers*, 314 F.3d at 1069; *Charles*, 348 F.3d at 609; *Benning*, 2004 WL 2749172, at *7.

U.S. 505 (1988)—"does not require the [State] Legislature to enact any laws or regulations." *Condon*, 528 U.S. at 151. It "does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* And it "does not *require* the States in their sovereign capacity to regulate their own citizens." *Id.* (emphasis added). Rather, RLUIPA imposes substantive *prohibitions* on certain state activities that restrict personal liberties. When a federal statute simply prevents state actors from taking action that will (in Congress's view) harm its own citizens, it is difficult to see how they have been "commandeered" into federal service. Indeed, *Condon* squarely rejects such a claim.[25]

In the court of appeals, respondents argued that *Condon* is inapposite, and that RLUIPA is unconstitutional, because the law "exclusively target[s] States." Defendant-Appellants' Final Reply Br. 30 (6th Cir.). But nothing in the Constitution imposes a rule that Congress can restrict state activities in or affecting commerce only if it also imposes identical or closely similar regulation on analogous private activities. Indeed, such a requirement would be difficult, if not impossible, to square with the familiar practice of federal preemption—a tradition that extends back at least as far as *Gibbons v. Ogden*, in which the Court construed a federal statute to prohibit New York from granting a navigational monopoly. 22 U.S. (9 Wheat) 1, 11-21 (1824). Statutory preemption provisions, of course, generally apply *only* to restrict state regulation affecting commerce.

In some such cases, a federal restriction on state law is effected, not by federal-law "occupation" of the field, but by a specific congressional command of deregulation. For example, the Airline Deregulation Act of 1978 commands that States not regulate with respect to any price, route, or service of an air

[25] Respondents' accusation of federal "commandeering" is especially odd, because the substantive standard RLUIPA imposes on the ODRC is precisely the same standard of conduct that Ohio's own Constitution imposes on that department. *See Humphrey*, 728 N.E.2d at 1043, 1045. RLUIPA, in other words, does not appear to prohibit Ohio prison officials from doing anything that state law permits.

carrier. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (considering 49 U.S.C. § 41713(b)(1)). To similar effect is the "*Machinists* preemption" of the National Labor Relations Act, *see Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), which prevents state and local authorities from regulating labor-management relations, *not* because Congress replaced such regulation with a detailed federal scheme, but because the federal policy is one of government *non*intervention: "Congress intended to give parties to a collective-bargaining agreement the right to make use of 'economic weapons,' . . . free of governmental interference. . . . The *Machinists* rule creates a free zone from which all regulation, 'whether federal or State,' is excluded." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989) (quoting *Machinsts*, 427 U.S. at 150, 153) (internal citation omitted).

These forms of deregulatory federal preemption by definition apply to restrict *only* governmental regulation, since there is no analogous private regulation. *See, e.g., id.* at 110 (*Machinists* preemption "'protect[s] a range of [private] conduct against state but not private interference'") (quoting *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282, 290 (1986)). RLUIPA likewise restricts a particular manner in which states may treat private parties, when such treatment affects interstate commerce.[26]

Indeed, the commerce provisions of RLUIPA section 3 limit state prerogatives in a most deferential manner. They forbid certain state institutions from imposing unnecessary

[26] It is worth noting, in this respect, that RLUIPA does not single out the states for treatment that the federal government is not itself willing to live by—RFRA applies the same liberty-enhancing test on all of federal law. See supra at 2 & note 2. Moreover, there is good reason that Congress has not attempted to impose section 3's restrictions upon analogous *private* institutions—namely, that if Congress attempted to require private institutions to bear significant burdens in order to accommodate other private parties' religious exercise, it could raise Establishment Clause concerns. *See, e.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-710 (1985).

restraints on personal religious liberty, but leave it largely to state discretion how the state's accommodations of religion should be effected: "A government may avoid the preemptive force of [RLUIPA] by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden." 42 U.S.C. § 2000cc-3(e).

Of course, despite this broad discretion that RLUIPA affords the States, on occasion a State may have to take some affirmative action, or incur some minor costs, in order to comply with RLUIPA. That, however, is "'an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.'" *Condon*, 528 U.S. at 150-151 (quoting *Baker*, 485 U.S. at 514-515).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals on the Establishment Clause question, and decline to entertain the alternative grounds for affirmance. If the Court addresses those alternative grounds, it should hold that enactment of RLUIPA section 3 was a proper exercise of Congress's article I powers.

Respectfully submitted,

December 20, 2004

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IN THE

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JON B. CUTTER, *et al.*,
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v.

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BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Religious Land Use and Institutionalized Persons Act's provisions relating to the exercise of religion in state prisons are constitutional.

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BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE* [1]

The International Municipal Lawyers Association is a non-profit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is com-

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The Petitioners filed consents to the filing of amicus briefs in support of either party on December 9, 2004. A letter, dated December 30, 2004, from the Respondents consenting to the filing of this brief is on file with the Clerk.

prised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National League of Cities is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States cities, villages, and towns and more than 135,000 local elected officials. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters, including the Connecticut Chapter which joins in filing this amicus brief, as well as 19 divisions devoted to specialized planning interests, including the economic development division, and the housing and community development division. The APA represents more than 37,000 practicing planners, officials,

and citizens involved, on a day-to-day basis, in formulating and implementing planning policies and land-use regulations.

The *amici's* interest in this case stems from the fact that when Congress enacted RLUIPA, it put local governments in an untenable position. On the one hand, local governments are charged with the responsibility to protect the public welfare and to employ land use regulatory powers in a neutral and even-handed fashion. On the other hand, in the field of land use applicants, RLUIPA has elevated the religious institution as a special applicant when it seeks a conditional use permit or other land use development approval. Local decision-makers cannot balance all of the competing interests and goals of the community if one class of land use applicant can usurp the process to its own advantage.

SUMMARY OF THE ARGUMENT

While this case addresses only the prison provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq., ("RLUIPA"), which constitute only a portion of RLUIPA, this *amici* brief is being submitted for the purpose of bringing to the Court's attention that more is at stake than the prison provisions alone. 42 U.S.C. § 2000cc(a), ("Section (a)(2)(B)" of RLUIPA), also imposes strict scrutiny on neutral, generally applicable land use laws. Similar constitutional reasoning may be applied to invalidate both the prison and the land use regulations, but *amici* believe that the land use regulations are sufficiently distinct from prison regulation to merit a brief on RLUIPA's effect on land use laws and the constitutionality of Section (a)(2)(B).

Section (a)(2)(B) is unconstitutional for a number of reasons. First, by enacting Sec. (a)(2)(B), Congress acted beyond its Fourteenth Amendment enforcement power. Congress also overstepped its bounds under concepts of federalism and under the Tenth Amendment. Section (a)(2)(B) is a direct

regulation by Congress of an area that inherently belongs to state and local control, and introduces a novel means for Congress to expend its powers vis-à-vis the states. Section (a)(2)(B) is, therefore, an improper exercise of Congress's interstate commerce power.

In addition, because RLUIPA provides a direct benefit only to religious individuals or entities, it violates the Establishment Clause. RLUIPA is not a permissible accommodation, but rather is a blind accommodation for an entire universe of laws and religious practices barely examined by Congress. RLUIPA also violates the doctrine of separation of powers because Congress has made itself the branch to effect accommodation, attempted to overrule a First Amendment decision of this Court, and put itself in the role of setting burdens of proof. Lastly, RLUIPA also attempts to change the standards for evaluating claims under the Free Exercise Clause in an inappropriate manner.

ARGUMENT

I. BACKGROUND

RLUIPA was preceded by the Religious Freedom Restoration Act, which was held unconstitutional in *Boerne v. Flores*, 521 U.S. 507 (1997). This Court held that RFRA was: (1) a hostile and unconstitutional takeover of the states' sovereign power, *Boerne,* 521 U.S. at 532; (2) a usurpation of the judiciary's role in interpreting the First Amendment, *id.* at 535-36; and (3) an abdication of the states' and people's roles in amending the Constitution. *Id.* at 529.

Section (a)(2)(B) of RLUIPA applies the same standard to neutral, generally applicable land use laws that RFRA applied to all neutral, generally applicable laws. Section (a)(2)(B) of RLUIPA, which governs land use law, is unconstitutional on

its face.[2] The following is a summary of its constitutional defects. The remainder of the brief will focus more closely on Congress's overreaching into local and state land use lawmaking pursuant to Sec. (a)(2)(B) in violation of bedrock federalism principles.

First, Sec. (a)(2)(B) is beyond Congress's Fourteenth Amendment enforcement power. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370-73 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-84 (2000); *United States v. Morrison*, 529 U.S. 598, 625-27 (2000); *Boerne*, 521 U.S. at 532-33; *see also Tennessee v. Lane*, 124 S. Ct. 1978, 1988-90 (2004); *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1100-1102 (C.D. Cal. 2003).

Second, it overtakes the Constitution's inherent limits of federalism and the Tenth Amendment, and therefore is an improper exercise of Congress's interstate commerce power. *See Printz v. United States*, 521 U.S. 898, 923-24 (1997); *United States v. Lopez,* 514 U.S. 549, 561-63 (1995); *see also Reno v. Condon*, 528 U.S. 141, 148 (2000) (holding that when state acts as a private economic actor, as opposed to a sovereign, it may be regulated by Congress's interstate commerce power).

Third, it violates the Establishment Clause. *Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring); *see also Cutter v. Wilkinson*, 349 F.3d 257, 263-68 (6th Cir. 2003). RLUIPA is the opposite of the voucher program approved in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), where this Court held that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious

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[2] *Amici* do not address the Spending Clause or equality provisions of RLUIPA that govern land use, which pose different constitutional issues than those involving Sec. (a) and the prison provisions at issue in this case, 42 U.S.C. § 2000cc-1 (2004).

schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Id.* at 652. In contrast, RLUIPA is a direct benefit enjoyed by only religious individuals or entities. Indeed, if the argument is that RLUIPA regulates interstate commerce, it is doing so by singling out religious landowners for special treatment in interstate commerce, which violates the Establishment Clause.

Various amici have attempted to argue that RLUIPA is simply a legitimate religious accommodation statute, and therefore no violation of the Establishment Clause. While the Court specifically has upheld practice-specific accommodations, see *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (referring favorably to peyote exemptions), and *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) (upholding exemption for religious employee hiring from anti-discrimination laws), it has never upheld this sort of blind accommodation wherein the religious practices accommodated were barely acknowledged, let alone contemplated. Land use by religious entities encompasses a wide array of building projects, social services, programs, and impacts, few of which were ever mentioned in the RLUIPA legislative history. Proper legislative accommodation places the legislature in the position of making a public policy determination whether the accommodation is consistent with the public good. See, e.g., *Smith*, 494 U.S. at 890. When the public good is nowhere considered, as in the RLUIPA legislative history, and the accommodation reaches religious practices never contemplated by the legislature, it is not legitimate, but rather a blind handout afforded religious entities solely because of their religious identity.

Fourth, it violates the separation of powers in three ways. It puts courts into the shoes of legislators, by giving them the power to carve out religious exemptions from duly enacted,

neutral, generally applicable laws. *Cf. O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, No. 02-2323, 2004 U.S. App. LEXIS 23781, at *69-71 (10th Cir. Nov. 12, 2004) (McConnell, J., concurring) (applying strict scrutiny under RFRA and making determination that the public interest is better served by a judicially-created exemption than the existing neutral, generally applicable, Controlled Substances Act). Courts are not institutionally competent to make the public policy determinations demanded by RLUIPA. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). It also grants Congress the last word on the interpretation of the Constitution in conflict with *Marbury v. Madison*, 5 U.S. 137 (1803). *Boerne*, 521 U.S. at 536. Finally, it takes over the courts' power to set standards of constitutional review and to assign burdens of proof. It is a congressional act that is "designed to control cases and controversies. . . ." *Id.*; *see also* Gregory S. Watson, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional*, 23 Hawaii L. Rev. 479, 486-87 (2001).

Fifth, by attempting to set a new standard of free exercise rights through simple majority vote, RLUIPA attempts a piecemeal amendment of the Constitution. *See* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. Pa. J. Const. L. 1, 18 (1998).

The long-established rule under the Free Exercise Clause is that religious conduct is governed by the rule of law. That is, identical actions resulting in the same harm are governed by the same laws. Religious belief is absolutely protected and religious speech is highly protected. But religious conduct—because it has the capacity to harm others and the public good—may be regulated and is no defense to the law. As this Court stated in *Gillette v. United States*, 401 U.S. 437, 461 (1971): "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves

an objector from any colliding duty fixed by a democratic government." *See generally Smith*, 494 U.S. 872; *Reynolds v. United States*, 98 U.S. 145 (1878). Accordingly, rationality review—not strict scrutiny—applies to generally applicable, neutral laws. *Smith*, 494 U.S. at 883-85.[3]

This rule has governed land use law as applied to religious landowners and developers for decades. "In a long line of decisions, the federal courts and the several state courts of last resort now advance the general rule that any municipality may, as a lawful exercise of the police power, enact comprehensive zoning ordinances, provided they are enacted pursuant to proper enabling authority." Zoning Law and Practice § 3-6 (Matthew Bender & Co. 2004). This principle applies to religious as well as secular landowners, as it must if the general good of the community through pairing compatible uses is to be achieved.

The need for sensible land use and zoning laws as applied to religious projects has increased over time as "[t]he traditional concept of a small church serving the immediately neighboring community" has been supplanted by:

> [T]he establishment of a modern church, not dependent upon local residents as its communicants, and in some instances attracting people from far distances, the in-

[3] In a small number of cases and for a relatively short period of time, this Court experimented with applying strict scrutiny to neutral, generally applicable laws. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972). The result was that actors—simply because they were acting from religious motivation—were given greater latitude to violate the law, even when the legislature had determined that the conduct was against the public interest. *Smith* returned free exercise doctrine to the dominant rule, which permits religious exemptions from generally applicable, neutral laws only through legislative action, because the legislature is the more institutionally competent branch to determine the public good. *See generally* Marci A. Hamilton, *Religious Institutions, the Rule of Law, and the Public Good*, 2004 B.Y.U. L. REV. 1099 (2004).

> evitable use of the automobile in connection therewith and the increased activities of the church for social and community functions having only a remote connection with its primary function, all present a different zoning picture.

1 Arden H. Rathkopf, Law of Zoning and Planning 19-28 (3d ed. 1975); *see also* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 340 (2003).

Some have tried to defend Section (a)(2)(B) on the ground that it only addresses "individualized assessments" on the theory that any "individualized" assessment of a case by land use authorities triggers strict scrutiny. This is a fundamental misunderstanding of this Court's free exercise jurisprudence. Individualized assessments, otherwise known as case-by-case assessment, only trigger strict scrutiny under the Free Exercise Clause where religious claims are treated less well than secular claims. For example, the unconstitutional individualized assessment in *Sherbert v. Verner,* 374 U.S. 398 (1963), involved an unemployment compensation scheme that permitted workers to avoid weekend work for secular reasons but that refused to permit religious reasons. The reasons for the refusal were the unconstitutional element, not the fact that there were case-by-case determinations.

Case-by-case analysis—e.g., what this Court does as a matter of course—is not presumptively unconstitutional. Rather, only those systems of individualized assessment that treat religious reasons less well than secular reasons trigger strict scrutiny under the Free Exercise Clause. Thus, Section (a)(2)(B) captures many land use disputes that do not mandate strict scrutiny and, therefore, its imposition of strict scrutiny increases the level of scrutiny dramatically. Its corresponding burden on local land use law is a federal takeover of inherently local and state regulation.

It is important to note that Section (a)(2)(B) of RLUIPA does not regulate land use itself. Congress did not hold hearings to determine how many parking spaces are needed for each seat in a church, or what flow of traffic is appropriate in a residential neighborhood, or what levels of occupancy are appropriate in a particular district. Indeed, how could Congress reach such determinations without input from the community's members, knowledge of each community's particular needs, or the geographical layout of the particular community? Congress is inherently ill-equipped to enact state and local land use regulations.[4]

Rather, Section (a)(2)(B) regulates land use *law*. This is a constitutionally dispositive distinction. With the land use provisions of RLUIPA, Congress has attempted to take over one of the most, if not *the* most, clearly recognized arenas of local and state control. It goes to the core of local and state regulatory power. *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 137 (2002) ("land use law is one of the bastions of local control, largely free of federal intervention."), *summary judgment granted in part and denied in part*, No. 01-1919, 2004 U.S. Dist. LEXIS 16397 (E.D. Pa. Aug. 17, 2004) (interlocutory appeal pending decision).

Setting aside constitutional violations, land use law naturally belongs under the control of state and local law. The reason for this is three-fold. First, the permanent nature of land and each tract's uniqueness make its uses far more relevant to those who are nearby than those who are far away. Second, how land is used is an essential ingredient for communities to develop their character and to ensure harmonious use. Third, by keeping land use law local, citizens have

[4] The federal Fair Housing Act, 42 U.S.C. § 3601 (1968), is distinguishable. The Fair Housing Act forbids discrimination against potential landowners and renters; it does not address the physical impact of a building project on neighbors or a community.

correspondingly more direct access to their representatives and a proportionally larger voice in the lawmaking process that so directly affects their interests.

Land use law is enacted by state and local governing bodies and implemented by locally elected or appointed boards, with publicized public hearings an integral component in altering the law and in applying it. This Court consistently has recognized "the States' traditional and primary power over land and water use." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (holding that regulation of land use is a function traditionally performed by local governments); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *see also F.E.R.C. v. Mississippi*, 456 U.S. 742, 767-68 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity"); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928) (reviewing zoning restrictions under low level scrutiny); *Gorieb v. Fox*, 274 U.S. 603, 610 (1927) (upholding local setback requirement); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (upholding local zoning ordinance prohibiting construction of business buildings); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (local ordinance imposing building restrictions upheld).[5]

These principles do not become inapplicable simply because the landowner is a religious entity or individual. The impact of a building or land use project on a neighbor and community is felt just as keenly whether it arises from a secular or a religious landowner.

[5] Notably, none of these long-settled principles were voiced, let alone acknowledged, during the hearings for RFRA or RLPA. There were no hearings for RLUIPA itself.

The Supreme Court has never, repeat never, applied strict scrutiny to land use laws simply because they affected religious landowners—even during the few years in which the Court embraced strict scrutiny in some cases, e.g., compulsory education laws. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). To the contrary, in the one relevant action, this Court dismissed an appeal brought by a church claiming the right to locate in a residential district, because the case lacked a substantial federal question. The Court later characterized that dismissal as follows:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

American Communications Ass'n. v. Douds, 339 U.S. 382, 397-398 (1950) (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Porterville*, 338 U.S. 805 (1949))

The federal courts' recognition that land use law is a state and local power has meant that each state has been left to develop its own land use jurisprudence suited to its land and its people, and that the federal courts have "emphasize[d their] reluctance to substitute [their] judgment for that of local decision makers, particularly in matters of such local concern as land-use planning." *Sameric Corp. v. Philadelphia*, 142 F.3d 582, 596 (3d Cir. 1998); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999) (holding that zoning is a traditionally local activity); *Porterville*, 338 U.S. at 805; *Minney v. City of Azusa*,

359 U.S. 436, 436 (1959). RLUIPA, in contrast, inserts the federal government into the most mundane local land use disputes.

The effect of RLUIPA on residential neighborhoods in particular has been extreme. As early as 1926, this Court recognized the power of communities to create residential havens for families. *Euclid*, 272 U.S. at 394-95. The Court reaffirmed this principle almost 50 years later:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Belle Terre, 416 U.S. at 9 (citation omitted).

Upon RLUIPA's enactment, homeowners discovered that their religious neighbors have the right to go to federal court to overcome the zoning rules that make the neighborhood residential and safe for families. RLUIPA creates two classes of property owners: religious and all others. With RLUIPA in place, the former have first-class status, while the latter have been reduced to second-class status. It violates fundamental principles of equality in the context of one of the core principles undergirding the constitutional order—private property and home ownership. RLUIPA also has introduced a disturbing degree of discord in previously tranquil residential neighborhoods.

II. RLUIPA IS UNCONSTITUTIONAL

There are two purported bases for Congress's power to enact RLUIPA: the Commerce Clause and Section 5 of the Fourteenth Amendment. Neither basis is sufficient, because

the states' power to determine local land use law cannot be overtaken by the Congress in this way.

A. Section 5 of the Fourteenth Amendment Does Not Support RLUIPA

Under Section 5 of the Fourteenth Amendment, Congress may not regulate the states' regulation of land use unless there is proof that the states have engaged in "widespread and persisting" constitutional violations in the land use context and that the federal law is "congruent and proportional" to those violations. *Tennessee v. Lane*, 124 S. Ct. 1978, 1993 (2004); *Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 81; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 645 (1999); *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Boerne*, 521 U.S. at 519-20, 533-34; *Nanda v. Bd. of Trs. of the Univ. of Ill.*, 303 F.3d 817, 824 (7th Cir. 2002), *cert. denied,* 539 U.S. 902 (2003). This principle exists to square Congress's Section 5 powers with the Constitution's inherent limits on federalism. *Boerne*, 521 U.S. at 524.

Those limits were never more in need than with RLUIPA, which attempts to federalize that which naturally and properly belongs under state and local control: land use governance. Under RLUIPA, the state and local governments and the people they serve are no longer able to determine local neighborhood requirements, to ensure peaceful enjoyment of private property—especially that of homeowners—or to enforce the many master plans that spread uses throughout the community to ensure harmonious uses. RLUIPA hands the religious landowner a unique "legal weapon" to battle laws restricting traffic, noise, and intense uses, and in effect, steals state and local power to serve their communities. *See Boerne*, 521 U.S. at 534-35.

Section (a)(2)(B) fails both requirements. *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1099 ("Congress's Section 5

authority is not absolute . . . and is a particularly tenuous basis upon which to found RLUIPA.").

After a decade of searching for examples of unconstitutional treatment of religious projects by local zoning officials, the supporters of RLUIPA cobbled together a short string of land use anecdotes that do not begin to illustrate the sort of widespread and persisting state *constitutional* violations necessary to justify such massive and pervasive congressional intervention in such a substantial and traditional arena of state and local control. *Id.* While it is true that religious landowners, like every other land-owning entity, bear incidental burdens imposed by generally applicable, neutral land use regulations, such burdens do not amount to constitutional violations. In fact, there is little, if any, proof that churches have been the targets of discrimination by local zoning boards.[6]

Those courts that have upheld RLUIPA's constitutionality in the land use context have accepted as true the sponsors' claims to a strong legislative record, without independent examination of the record itself. *See, e.g., Westchester Day School v. Village of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003), *vacated and remanded,* 386 F.3d 183 (2d Cir. 2004); *Freedom Baptist Church of Delaware County*, 204 F.Supp.2d 857, 861 (E.D. Pa. 2002); *Life Teen Inc. v.*

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[6] A record is not necessary to prove that Congress has the power to enact a law under Section 5 of the Fourteenth Amendment if there is general knowledge of widespread and persisting constitutional violations. *See Boerne,* 521 U.S. at 526; *see also Nanda,* 303 F.3d at 817. There is no general knowledge that religious landowners are persistently discriminated against by land use authorities across the United State, as compared to others in the zoning process. Indeed, in the only neutral land use study of churches and zoning done to date, churches do quite well in the process. *See* Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. Church & St. 335, 337 (2000).

County of Yavapai, No. CIV 01-1490, 2003 U.S. Dist. LEXIS 24363, *46-47 (D. Ariz. Mar. 26, 2003), *interlocutory appeal denied,* 2003 U.S. Dist. LEXIS 24364 (D. Ariz. June 17, 2003); *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1155 (E.D. Cal. 2003); *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87, 118 (D. Conn. 2003), *appeal pending*, No. 03-9329 (2d Cir. argued Sept. 21, 2004); *United States v. Maui County*, 298 F. Supp. 2d 1010, 1016-17 (D. Haw. 2003). Congress's choice of adjectives to describe its own record cannot satisfy the test set forth in *Boerne*.[7]

Not only is the legislative history deficient of proof of constitutional malfeasance by the states, but also it is utterly bereft of the expertise of the many state or local officials or government organizations that could have testified authoritatively regarding zoning practices and religious landowners. No land use official, state, city, or municipal official, organization representing states, cities, local governments, counties, or historical preservation organization was permitted to testify for the record on the failed Religious Liberty Protection Act ("RLPA"), whose legislative history is used to justify RLUIPA. The views of those with the most knowledge and the most experience on the subject have been excluded from the legislative record. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 342 (2003).

Although land use laws may have an "effect" on churches, just as they have an effect on all other landowners and developers, there is no evidence of *widespread* and *persisting*

[7] The same problem is evident on the prison side of RLUIPA, where Senators Hatch and Kennedy's conclusory joint statement has been repeatedly offered as sufficient proof that Congress has the authority to regulate state and local prisons and jails.

discrimination against religious landowners that would justify the federal overreaching of RLUIPA.

Even if this Court were to find widespread and persisting free exercise violations by land use lawmakers across the country, Section (a)(2)(B)'s resort to strict scrutiny for every instance in which a generally applicable, neutral land use law is applied to a religious landowner is incongruent and disproportional to any problems such landowners are claiming in the land use context. *Id.; Boerne,* 521 U.S. at 530-32; *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1101 (RLUIPA's test "does place a nearly, even if not entirely, insuperable barrier before States and municipalities attempting to justify actions that, far more often than not, are neither motivated by religious bigotry nor burdensome on central religious practice or beliefs."). Sec. (a)(2)(B) is an invalid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

B. Section (a)(2)(B) of RLUIPA Is Not a Proper Exercise of Congress's Power Under the Commerce Clause

The Commerce Clause provides Congress with the authority to enact legislation to regulate commerce with foreign nations, among the states and with the Indian tribes. U.S. Const. art. 1, § 8, cl.3.

This Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. *See Lopez*, 514 U.S. 549. The first two categories involve laws that either "regulate the use of the channels of interstate commerce" or "regulate and protect the instrumentalities of interstate commerce, and the persons or things in interstate commerce, even though the threat may come only from intrastate activities," such as interstate highways, telecommunications, shipping, etc. *Id.* at 561. RLUIPA does not fit into either of these two categories. The third category includes the power to regulate intrastate activities where the

activity has a substantial effect on interstate commerce. *Id.* at 559. The Court has stated that this last category includes only those activities that are economic in nature.

Five years after *Lopez*, the Supreme Court overturned the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598 (2000), and "established what is now the controlling four-factor test for determining whether a regulated activity 'substantially affects' interstate commerce." *United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003). When considering whether a statute is consistent with the Commerce Clause Power, the determinative factors are:

> 1) [W]hether the statute in question regulates commerce 'or any sort of economic enterprise'; 2) whether the statute contains any 'express jurisdictional element which might limit its reach to a discrete set' of cases; 3) whether the statute or its legislative history contains 'express congressional findings' that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and substantial effect on interstate commerce is 'attenuated'.

Id. (quoting *Morrison*, 529 U.S. 598, 610-612 (2000)).

1. *RLUIPA Does Not Regulate Commerce or Any Sort of Economic Enterprise*

RLUIPA does not regulate the economic aspects of land use, but rather, land use *law*. State and local law, by their nature, do not affect interstate commerce for purposes of Commerce Clause analysis. "The Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Printz*, 521 U.S. at 924. RLUIPA is triggered by imposition of the state or local law and therefore is not even applicable if the state or local government has not passed or enforced a land use law. RLUIPA is regulating a non-economic activity—land use law

and regulation—that by its very nature cannot support a "nexus with interstate commerce." *Lopez*, 514 U.S. at 562 (quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971); *see also Terrero v. Watts*, No. CV202-134 (S.D. Ga. Oct. 14, 2003).

The Commerce Clause permits Congress to regulate private citizens or states acting as economic actors. *See Condon*, 528 U.S. at 151; *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 288 (1981)). Yet, RLUIPA does not regulate private citizens or states acting as market participants. Rather, RLUIPA regulates state and local government in their role as sovereigns, for the benefit of private citizens. The Supreme Court's federalism cases have made clear that path is foreclosed to Congress. *Garrett,* 531 U.S. at 364 (citing *Kimel*, 528 U.S. at 79); *Morrison*, 529 U.S. at 618-619; *Printz*, 521 U.S. at 924 ("[T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

Amici Senators Hatch and Kennedy argue that RLUIPA is not an unconstitutional exercise of the Commerce Clause power on the theory that it is a form of deregulatory federal preemption. *See* Brief of Amici Curiae Senators Orrin G. Hatch and Edward M. Kennedy, at 28-30. They cite the Airline Deregulation Act of 1978 upheld in *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992) and the "Machinists preemption" rule of *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). This is quite a stretch. First, neither case even addressed the Commerce Clause issue. Moreover, Senators Kennedy and Hatch are inviting this Court to extend congressional power well beyond existing law. While federal economic deregulation may well be constitutional, the underlying federal statute must first have some relation to interstate commerce. The

deregulated activity in each case cited by amici was so obviously and thoroughly related to interstate commerce that the exercise of the Commerce Clause power—even when the federal law worked to hinder state law—was not even at issue.

RLUIPA fails under this reasoning for three reasons. First, under RLUIPA, the "deregulated" activity, i.e., the state's ability to enforce generally applicable and neutral prison regulations and zoning laws, is non-economic. *Reno v. Condon*, 528 U.S. 141, 148 (2000). Second, in the land use context, the federal government has no authority to regulate land use law, because it is a quintessentially state and local economic activity. Third, if the argument is that RLUIPA is deregulating land use law as an economic matter, then singling out religious landowners surely violates the Establishment Clause. It is not nullifying state law for the purpose of aiding the economy but rather solely to aid reli-gious entities over and against neutral, generally applicable land use regulations. Indeed, it is quite clear that the members of Congress were not concerned about RLUIPA's effect on the economy. It is a non-economic statute intended to put religious landowners in a privileged position. *See Lopez*, 514 U.S. at 562-63.

2. *The Link Between the Regulated Activity and Substantial Effect on Interstate Commerce Is Too Attenuated to be a Constitutional Exercise of the Commerce Clause Power*

The universe of that which is being regulated pursuant to the Commerce Clause must "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558. Although individual instances of economic activity may not by themselves substantially affect interstate commerce, their aggregation may. *Wickard v. Filburn*, 317 U.S. 111 (1942). Yet, where that which is being regulated is not economic in nature–like state

and local regulation—such aggregation does not amount to a substantial effect on interstate commerce. *See Morrison*, 529 U.S. at 617-18 (stating commerce power does not extend to traditional local regulation even if, in the aggregate, such activities substantially affect commerce); *see also Raich v. Ashcroft*, 352 F.3d 1222, 1231 (9th Cir. 2003), (growth and use of medicinal marijuana is not commercial and the aggregation analysis of *Wickard* is therefore inapplicable); *McCoy*, 323 F.3d at 1122 (possession of a single pornographic picture of a child "was purely non-economic and non-commercial" and was not analogous to the aggregation in *Wickard*.).

The Court in *Lopez* refused to follow the tortured logic that justified the Gun-Free School Zones Act: violence affects schools, and schools train tomorrow's work force, therefore guns near school zones affect "national productivity." The same reasoning was invoked to justify RLUIPA, which rests on the backward theory that Congress may directly regulate state and local land use law affecting religious landowners, because the landowners themselves make economic decisions that affect the interstate market.

If Section (a)(2)(B) were upheld as a valid exercise of commerce power, then Congress would have the newfound power to take over any arena of state law it so desires and claim that the economic interests of those being regulated by the states satisfy the requirements of the Commerce Clause. That would yield Congress plenary power to regulate the states as states, far exceeding the enumerated powers the Congress provides. *See McCoy*, 323 F.3d at 1124 ("It is particularly important that in the field[s] . . . where state power is preeminent, national authority be limited to those areas in which interstate commerce is truly affected."). RLUIPA's effect on interstate commerce is too attenuated to justify this exercise of congressional power.

3. *RLUIPA and Its Legislative History Do Not Support the Finding That the Regulated Activity Affects Interstate Commerce*

As previously explained, *supra*, the congressional record supporting RLUIPA is dubious at best. The statute asserts that, "the substantial burden[s] affect[] . . . commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc(a)(2)(B). While there is precious little regarding effect on interstate commerce, the legislative history of RLUIPA indicates Congress believed that "the burden [i.e., the state or local law] prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods." 146 Cong. Rec. S. 7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy). The characterization is inaccurate, however. The regulated "activity" is land use law, and as explained, *supra*, land use law has no constitutionally significant impact on commerce. If RLUIPA were regulating building project impacts themselves, the answer might be different, but it does not.

The question whether there is impact on commerce is one for the courts. "[I]t is not the mere *existence* of legislative findings that is determinative." *McCoy*, 323 F.3d at 1127 (emphasis in original). "Rather, '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question.'" *Id.* (quoting *Morrison*, 529 U.S. at 614). Local and state land use laws, by their nature, deal solely with non-economic and intrastate commercial ventures. *United States v. Corp*, 236 F.3d 325, 332 (6th Cir. 2001); *United States v. Maxwell*, 386 F.3d 1042, 1063 (11th Cir. 2004) (jurisdictional hook not enough to sustain conviction). As previously argued, *supra*,

the connection to interstate commerce is too attenuated to justify this exercise of congressional power.

4. *RLUIPA Does Not Contain Any Express Jurisdictional Element Which Might Limit Its Reach to a Discrete Set of Cases*

Those defending RLUIPA have hung their hopes on the theory that Congress has carte blanche authority to regulate so long as it provides a "jurisdictional element." *Lopez*, 514 U.S. at 559. This argument elevates form over substance. By "jurisdictional element" RLUIPA supporters mean that RLUIPA is applicable only in individual cases where a substantial burden on interstate commerce is found. RLUIPA does in fact require a showing that the "substantial burden affects . . . commerce . . . among the several states." 42 U.S.C. § 2000cc(a)(2)(B). The jurisdictional element, however, does not save RLUIPA from constitutional violation because the jurisdictional element of RLUIPA simply cannot be satisfied. *It is nonsensical to ask whether land use law affects commerce, because it is non-economic in nature.*

Like the 'jurisdictional hook' in *McCoy*, which was found to be inadequate to justify the federal law under the Commerce Clause, RLUIPA "not only fails to limit the reach of the statute to any category . . . of cases that have a particular effect on interstate commerce, but, to the contrary, it encompasses virtually *every* case imaginable" where a religious group challenges a local land use law, because it regulates the law, not the economic activity. *McCoy*, 323 F.3d at 1124 (emphasis in original).

C. RLUIPA Violates the Constitution's Inherent Principles of Federalism and the Tenth Amendment

RLUIPA is a violation of three federalism principles.[8] First, the Court's federalism cases have emphasized that Congress may not regulate areas that traditionally or inherently belong to state and local control. *See Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 617-18. State and local land use laws clearly occupy an area of inherent state and local control.

Second, no court (other than those who have misguidedly upheld RLUIPA) has held that the "jurisdictional element" hands Congress the power to directly regulate the states in their sovereign capacity. This Court's dictum in *Lopez* does not create a *per se* rule that the magic words of a jurisdictional element can save every federal statute from federalism defects. "[The statute] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562.

This "jurisdictional element" dictum in *Lopez* is intended to ensure that the limits of federalism are observed, not to introduce a novel means of circumventing those limitations. "A 'hard and fast rule' upholding a statute's constitutionality under the *Commerce Clause* whenever a jurisdictional element was present would 'ignore[ ] the fact that the connection

[8] Both the Constitution's inherent limits of federalism and the Tenth Amendment limit the reach of the Commerce Clause. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). Under this Court's cases, land use policy has customarily been a feature of local government and an area in which the tenets of federalism are particularly strong. *See, e.g., Solid Waste Agency*, 531 U.S. at 159; *Village of Belle Terre*, 416 U.S. at 1; *Euclid*, 272 U.S. at 365; *Izzo v. Borough of River Edge*, 843 F.2d 765 (3d Cir. 1988).

between the activity regulated and the jurisdictional hook may be so attenuated' that there may be no substantial effect on interstate commerce." *McCoy*, 323 F.3d at 1126 (quoting *United States v. Rodia*, 194 F.3d 465, 472 (3d Cir. 1999)). This is especially true for RLUIPA, which introduces a jurisdictional hook that is intended to justify wholesale takeover of state and local zoning and land use laws whenever applied to religious landowners.

Third, RLUIPA singles out the state and local governments in their sovereign capacity. RLUIPA does not regulate land use, e.g., setbacks or density requirements, but rather regulates the law of land use. To Amicis' knowledge, these features make RLUIPA unique among all federal laws invoking the Commerce Clause. RLUIPA is the next step in Congress's ongoing attempt to expand its own power at the expense of the states, and should be recognized as such.

While the states have been permitted to be regulated as part of a congressional policy to regulate economic activity, RLUIPA presents the circumstance where they are being regulated in their sovereign capacity and not as economic actors. *See Printz*, 521 U.S. at 924 ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts. . . . [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.") (citing *New York,* 505 U.S. at 166). As the Court explained in *Reno v. Condon*, 528 U.S. 141 (2000), when it upheld the Driver's Privacy Protection Act of 1994, the Act did not regulate the states in their sovereign capacity, but rather "the universe of entities that participate as suppliers to the market for motor vehicle information - the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in com-

merce." *Condon*, 528 U.S. at 151. With the DPPA, Congress was regulating the flow of information in the "stream of interstate commerce," and not the "'manner in which States regulate private parties.'" *Id.* at 150 (relying on and citing *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)). The reasoning of *Condon* leads to the conclusion that the federal government may regulate an economic market under the Commerce Clause, but it may reach the states under that regulation only if they are acting as economic actors in that market. RLUIPA, of course, regulates the states in their role as lawmakers, not economic actors. The *Condon* Court distinguished a federal law like RLUIPA that "regulates the States exclusively," saying that issue was not presented by the DPPA. *Id.* at 151. A federal law that targets the states acting in their sovereign capacity to regulate private parties violates plain principles set forth in the Supreme Court's federalism cases.

CONCLUSION

Section (a)(2)(B) of RLUIPA attempts to take over state and local control of an arena— land use law—that has long been held to be quintessentially local. There is no constitutional authority for this direct intervention in state and local law under either Section 5 of the Fourteenth Amendment or the Commerce Clause.

RLUIPA is not a reiteration of the Supreme Court's free exercise jurisprudence, and therefore simply redundant of the Free Exercise Clause. To the contrary, it imposes strict scrutiny against generally applicable, neutral laws, which places it in direct opposition to the Supreme Court's most recent free exercise cases, *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); and *Locke v. Davey*, 540 U.S. 712 (2004).

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In The
Supreme Court of the United States

Jon B. Cutter, *et al.*,
Petitioners,

v.

Reginald Wilkinson, *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For Sixth Circuit

Brief of National Association of Evangelicals and Union of Orthodox Jewish Congregations of America as Amici Curiae in Support of Petitioners

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QUESTION PRESENTED

Whether Congress violated the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act of 2000, which requires state prison officials who accept federal funds to lift unnecessary governmental burdens from the religious exercise of institutionalized persons under their control.

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INTEREST OF AMICI

The National Association of Evangelicals (NAE) is a nonprofit association of evangelical Christian denominations, local churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 51 denominations, as well as over 250 other religious ministries. NAE serves a constituency of over 20 million people. The Association believes that religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.[1]

The Union of Orthodox Jewish Congregations of America (UOJCA) is the largest Orthodox Jewish umbrella organization in the United States, representing nearly 1,000 synagogues and their members throughout the nation. The UOJCA worked intensely to enact RLUIPA, because of the experience of member congregations with discriminatory zoning and because of concern for Jews confined to prisons and other institutions who need reasonable accommodations such as a kosher diet and Jewish holy day observances.

In the modern regulatory state, exemptions are essential to minority faiths. Orthodox Jews rely almost daily on exemptions to obtain kosher food,[2] to observe the Sabbath and holy days,[3] and to wear religious items with military uniforms, 10 U.S.C. §774 (2000). Our institutions rely on exemptions such as the clergy-penitent privilege and the right to hire employees of our own faith, 42 U.S.C. §2000e-1(a)

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[1] This brief was prepared entirely by counsel for amici. No person other than amici and their counsel made any financial contribution to the preparation or submission of this brief. Petitioners' consent is on file with the Clerk; the consents of Respondents and the United States are submitted with the brief.

[2] *See* 7 U.S.C. §1906 (2000) (exempting ritual slaughter of livestock from the Humane Slaughter Act); *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974) (upholding that exemption).

[3] *See, e.g.*, 42 U.S.C. §2000e-2 (2000); N.Y. Executive Law §296.10 (Supp. 2005) (both providing for workplace accommodations).

(2000). For the sake of our religious liberty and those of all other Americans of diverse faiths, we respectfully submit this brief.

SUMMARY OF ARGUMENT

This brief addresses two related issues. First, Ohio's attack on regulatory exemptions for religious practice is inconsistent with the original understanding. There is much originalist debate about whether the founding generation understood regulatory exemptions to be constitutionally required. But there is no evidence that anyone thought they were constitutionally prohibited or that they were part of an establishment of religion.

Exemptions were never part of the establishment. The established church had no need for exemptions, because its teachings were in accord with government policy. Even nonestablished religions have no need of exemptions if they are large enough to control government policy. Exemptions protect minority religions, and they emerged only as an outgrowth of disestablishment, in the wake of toleration of dissenting worship.

Most exemptions were uncontroversial in the founding era, but exemptions from military conscription produced substantial debate, and claims to exemptions not authorized by the legislature produced litigation. In all this debate and litigation, we have no record of anyone suggesting that exemptions were an establishment of religion.

Congress and the states have enacted thousands of religious exemptions in an unbroken tradition stretching back to the late seventeenth century. This Court has repeatedly, and unanimously, said that such exemptions are generally valid. The original understanding helps explain and confirm both the tradition and the decisions. Exemptions do not support religion in any way that was ever part of an establishment of religion. Properly administered, exemptions are substantively neutral. Of course they are subject to

limits, but those limits must be adjudicated when they arise in specific cases. Nothing in our constitutional tradition suggests that exemptions are facially invalid.

Second, Ohio has indicated its intention to argue that the Establishment Clause affirmatively prevents Congress from interfering with state establishments of religion. This argument has been labeled, or mislabeled, the "federalism" interpretation of the Establishment Clause. It is subject to the originalist objection already discussed. The exemptions are not an establishment, and Ohio does not claim that its refusal of exemptions is part of a policy to establish some other religion. Congress is simply not interfering with an establishment of religion.

Moreover, the claim that the Establishment Clause prohibits Congressional interference with state establishments is not true. In some versions, this claim would require overruling or rewriting every Establishment Clause decision in the history of this Court. It is based partly on an interpretation of "respecting" that was never mentioned in the founding era. It would implausibly make the Establishment Clause a protection for the lingering establishments in Massachusetts and Connecticut, which expressed no interest in the First Amendment and failed to ratify it. The argument relies on eighteenth-century disagreements about establishment at the state level, ignoring the far more relevant consensus about establishment at the federal level. It ignores the rapid move to consensus on disestablishment in the early nineteenth century, and Republican disapproval of southern establishment of pro-slavery versions of Christianity, culminating in incorporation of the individual-liberty understanding of the Establishment Clause in the Fourteenth Amendment.

There is a version of the argument that tries to avoid all these problems by claiming that Congress simply has no power to do anything affecting religion. This argument is incoherent; it forbids Congress either to include or exclude

religion in legislation. It abandons any link to constitutional text; it is inconsistent with two centuries of Congressional practice; and it would invalidate many existing statutes.

ARGUMENT

I. In the Original Understanding, Regulatory Exemptions for Religious Conduct Raised No Issue Under the Establishment Clause.

Ohio's Establishment Clause arguments come in many variations. But the core idea at the heart of all those arguments is that government can establish a religion by failing to regulate it. Exemptions from government regulation are said to establish the unregulated religion.

There is no significant originalist support for this core idea. Exemptions from regulation were no part of the establishment of religion known to the founding generation, and when exemptions emerged as an outgrowth of the state-by-state process of disestablishment, no one attacked them as an establishment.

A. Exemptions Were No Part of the Practices Associated with Establishment of Religion.

The essence of establishment was government sponsorship and control of a single church or, in later years, of a group of churches, such as all Protestants or all Christians. In Judge McConnell's comprehensive survey of establishment in England and the colonies, he identifies six historic "Elements of the Establishment:"[4]

1) governmental control over the doctrines, structure, and personnel of the state church;

2) mandatory attendance at religious worship services in the state church;

3) public financial support;

[4] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003).

4) prohibition of religious worship in other denominations;

5) use of the state church for civil functions; and

6) limitation of political participation to members of the state church.[5]

This careful listing of six distinct elements is organizationally helpful, but of course each of these elements is familiar from other descriptions of the established churches.[6]

Each of these historic elements of the establishment has its counterpart in modern doctrine. Government is not permitted to control the doctrines, structure, or personnel of religious organizations.[7] Mandatory attendance at worship services is unconstitutional, even when judicial deference is at its maximum;[8] the contested modern counterpart to mandatory worship is prayer and other religious observances at government-sponsored events that people attend for secular reasons.[9] Public financial support of religious worship is unconstitutional (save for generally available public services, which may include such occasional services as disaster relief); the question whether public financial support of religious schools is sufficiently analogous to be an establishment is a major and contested issue.[10] Prohibition of worship by

[5] *Id.* at 2131-81.

[6] *See, e.g.*, Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 1-77 (Oxford Univ. Press 1986).

[7] *See, e.g., Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929).

[8] *See Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (invalidating compulsory worship at military academies).

[9] *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).

[10] *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

minority faiths, which in modern times is rarely part of any effort to establish some other religion, is now treated as a free exercise issue.[11] The state cannot delegate government functions to churches or synagogues,[12] although it can contract for performance of specific services with religious and secular organizations alike.[13] The state cannot restrict political participation on the basis of religious convictions or religious participation.[14] Even the modern controversy over government endorsement of religious beliefs is analogized, by critics of such endorsements, to government designating the church or group of churches to be established.[15]

Exemptions from regulation do not appear on Judge McConnell's list or in any other description of the established church. The established church had no need of exemptions, because government rarely made laws that prevented members of the established church from practicing their religion. Laws regulating conduct were generally consistent with the moral commitments of the established church, both because the established church and its members had substantial political influence, and because government's control over the established church, generally including the power to appoint clergy, tended to prevent the emergence of religious teachings that challenged government policy.

Even a nonestablished church has no need for exemptions where its members have political control. Thus in Pennsylvania, there was no exemption from military service or

[11] *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 472 U.S. 874 (1990).

[12] *See, e.g., Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

[13] *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988); *Bradfield v. Roberts*, 175 U.S. 291 (1899).

[14] *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978).

[15] *See* Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. U.L. Rev. 37, 41-48 (1991).

oath taking so long as the Quakers were politically dominant. Instead, the laws did not require military service or oath taking of anyone. Pennsylvania had no organized militia until 1755, and then participation was voluntary.[16] Exemptions were enacted only after pacifists lost control and the new majority enacted conscription.[17] Then the Quakers, as a minority faith even in Pennsylvania, needed exemptions. And within the limits described in the next section, these exemptions were enacted.

B. Regulatory Exemptions Were an Outgrowth of *Dis*establishment.

Regulatory exemptions emerged when the majority became willing to provide for the religious liberty of minority faiths. Exemptions were never part of the establishment; they grew out of the long process of *dis*establishment.

Disestablishment did not happen all at once, but unfolded first in certain colonies and later state-by-state in the early republic. The formal designation of an established and tax-supported church was abandoned over a period of about sixty years, beginning in the 1770s and ending in 1833.[18] But this was just one stage in a longer process; the multiple elements of the classic establishment were abandoned one-by-one over a period of centuries. As early as 1675, Connecticut exempted Quakers from attending the established worship -- provided they did not assemble themselves. Curry, *supra* note

[16] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1468 (1990); R.R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 413 (1952); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & Religion 367, 385-86 (1994).

[17] *See* West, *supra* note 16, at 388-89.

[18] *See* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1432-48, 1457-1540 (reviewing disestablishment state by state).

6, at 25. In 1689, the Act of Toleration permitted dissenting Protestants to worship in England, Esbeck, *supra* note 18, at 1413-14, and this reform spread slowly and unevenly through the colonies.[19]

Once a state decided that minority faiths should be permitted to freely worship, the logic of toleration suggested that they should also be exempted from other laws that made their lives unnecessarily difficult. Some legislators may have viewed this as a right and others as a matter of legislative grace, but either way, regulatory exemptions emerged in the wake of toleration of dissenting worship. The first exemption for conscientious objectors to military conscription was enacted in 1673, in famously tolerant Rhode Island, which never had an established church. *See* Russell, *supra* note 16, at 412-13. The first exemption from oath taking appeared early in the Carolina colony, chartered in 1663, which from the beginning recruited settlers by advertising "full and free Liberty of Conscience." Curry, *supra* note 6, at 56. As toleration spread through the eighteenth century, the exemption from oath taking became nearly universal.[20] Some state legislatures enacted exemptions from the requirement of removing hats in court. McConnell, *supra* note 16, at 1471-72. Rhode Island exempted Jews from incest laws with respect to marriages "within the degrees of affinity or consanguinity allowed by their religion." *Id.* at 1471 & n.315

Exemption from military service was of course the most controversial claim to exemption. *See generally* West, *supra* note 16. This exemption is necessary to relieve an egregious burden on one of the most deeply held obligations of

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[19] *See id.* at 1475-76, 1485-87, 1537; McConnell, *supra* note 4, at 2161-69.

[20] *See* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1630-32 (1989) (collecting provisions from state and federal constitutions). There were also statutory provisions, as in the North Carolina provision described in text.

conscience, but it also confers a large secular benefit, relieving those exempted from important duties that can be dangerous, unpleasant, and difficult. Most colonies, and later most states, responded to this difficulty with a compromise: Quakers and similar conscientious objectors were exempt from military service in person, but were required to serve as noncombatants, provide a substitute, or pay a commutation fee.[21]

Another common set of exemptions, more connected to the process of disestablishment, was exemption from paying taxes to support the established church. Beginning early in the eighteenth century, exemptions from church taxes spread through the colonies that collected such taxes.[22] The famous general assessment proposal in Virginia, in 1785, was a last attempt to preserve financial support for churches by including all Christian denominations in the benefits and by universalizing the exemption -- any taxpayer could support either the church of his choice or a fund for schools.[23] But on this issue, exemptions and multiple establishments were only a stopgap. By 1833, the last state system of tax support for churches was repealed in Massachusetts,[24] and exemptions from the church tax were no longer an issue.

C. No One In the Founding Era Attacked Regulatory Exemptions as Establishments.

Legislatively enacted exemptions for religious practice were thus common by the time of the First Amendment.

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[21] *See id.* at 1632-33; McConnell, *supra* note 16, at 1468-69; Russell, *supra* note 16, at 414; West, *supra* note 16, at 389.

[22] *See* Esbeck, *supra* note 18, at 1434-36, 1440-47, 1476-77, 1479, 1489-91, 1498, 1508 n.431; 1512; McConnell, *supra* note 16, at 1469.

[23] The Virginia bill is reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 72-74 (1947) (Supp. App. to Rutledge, J., dissenting). For analysis, *see* Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787*, at 108-09 (Univ. Press of Virginia 1977).

[24] *See* Esbeck *supra* note 18, at 1448, 1524; 1 Anson Phelps Stokes, *Church and State in the United States* 426-27 (Harper 1950).

There is of course a large originalist debate about whether this practice of exemptions was embedded in the Free Exercise Clause.[25] But there is no originalist debate about the point at issue here. The founding generation was familiar with legislatively enacted exemptions for religious practice, and the states were busily engaged in disestablishing churches, but we have no record of anyone arguing that legislatively enacted exemptions were an establishment.

Opponents of exemption from military service argued that exemption was bad policy, but not that exemptions were unconstitutional or that they implicated any concern about establishment of religion. In the First Congress, the Select Committee proposed to include, in what became our Second Amendment, a clause providing that "no person religiously scrupulous shall be compelled to bear arms." 1 *Annals of Cong.* 778 (Gales & Seaton, Aug. 17, 1789). The opponents made a variety of arguments in the Committee of the Whole. Elbridge Gerry feared that government would "declare who are those religiously scrupulous, and prevent them from bearing arms." *Id.* In this way, government might "destroy the militia, in order to raise an army upon their ruins." *Id.* This objection seems so implausible as to suggest a willingness to argue just about anything in support of a reflexive opposition. But he did not argue that the proposed exemption would establish religion; that argument was apparently too implausible and unfamiliar to occur to him.

Mr. Jackson thought the amendment "unjust," unless those exempted were required to pay an equivalent. *Id.* at 779. Mr. Smith thought those exempted should find a substitute. *Id.* Mr. Sherman and Mr. Vining supported the amendment as proposed. *Id.* Mr. Stone thought the text should clarify "what the words `religiously scrupulous' had reference to." *Id.* Mr. Benson moved to strike the whole clause and leave the issue to the legislature. *Id.* "I have no reason to believe but the

[25] *Compare City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting); *with id.* at 537-44 (Scalia, J., concurring).

Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion." *Id.* at 780. His motion was defeated, 24-22. *Id.*

Three days later, on the floor of the House, Mr. Scott also argued that this exemption should be left to the legislature. "I conceive it, said he, to be a legislative right altogether. There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords." *Id.* at 796 (Aug. 20, 1789). Mr. Boudinot supported the amendment. *Id.* The proposal was amended to read that "no person religiously scrupulous shall be compelled to bear arms *in person*" (emphasis added), and as amended, passed by the requisite two-thirds vote. *Id.* The clause was later removed in the Senate,[26] where debate was not recorded.

This debate reveals opponents who wanted a more limited exemption, requiring payment of a fee or provision of a substitute. These opponents prevailed in the House, by the addition of the words "in person." The debate reveals other opponents who wanted the whole issue left to legislatures, and these opponents appear to have prevailed in the Senate. But the debate contains no suggestion that legislative exemptions were in any way suspect. There is no hint in this debate of any issue concerning establishment of religion.

There was similar debate in Pennsylvania, where the legislature offered exemptions conditioned on noncombatant service or a fine of twenty shillings, and Quakers demanded an unconditional exemption. This dispute provoked a long political battle, which the Quakers eventually lost. Opponents of an unconditional exemption submitted petitions making a variety of arguments: that pacifism was a false religion, that "justice and equity" required service from all, that refusal to

[26] *See* 1 *Documentary History of the First Federal Congress of the United States of America* 136, 154 (Linda Grant de Pauw, ed., Johns Hopkins Univ. Press 1972).

serve in time of war struck at "the very Existence of Civil Government," that the religious liberty guarantee in Pennsylvania's charter did not include exemption from military service, that Quakers had paid taxes for military measures elsewhere in the British Empire. Counsel does not have access to the full text of these petitions, but in extensive summaries and quotations by a vigorous opponent of regulatory exemptions, there is no mention of a claim that unconditional exemption for Quakers would establish their religion. *See* West, *supra* note 16, at 390-91. And of course, Pennsylvania did exempt Quakers from serving in person.

Other exemptions did not leave a record of similar debate. Exemptions from oath taking were not controversial. Curry, *supra* note 6, at 81. With respect to the exemptions from paying taxes for the established church, the focus of debate was on whether the tax should be continued at all, whether members of minority faiths should have to pay taxes to their own church, and whether the exemptions were fairly administered.[27] No one appears to have thought that exemptions made things worse, or that exemptions established a religion. The question was whether exemptions were enough.

The record is similar in the reported cases from the early national era. Some lawyers argued against exemptions, and some judges ruled against exemptions, but no lawyer or judge appears to have argued that exemptions might establish a religion. John Gibson, Chief Justice of Pennsylvania, whose opinions are commonly cited as early rejections of any claim to a constitutional right to regulatory exemptions, said clearly that such exemptions could be allowed by legislators, or even by judges in cases properly within judicial discretion. In *Philips v. Gratz*, 2 Pen. & W. 412 (Pa. 1831), a Jewish plaintiff sought a continuance when his case was called for

[27] *See* Curry, *supra* note 6, at 162-92; Esbeck, *supra* note 18, at 1434-36, 1440-47.

trial on Saturday. The motion was denied, the case was tried, and plaintiff appealed. Chief Justice Gibson wrote:

> The religious scruples of persons concerned with the administration of justice will receive all the indulgence that is compatible with the business of government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath. But when a continuance for conscience' sake is claimed as a right, and at the expense of a term's delay, the matter assumes a different aspect.

Id. at 416. Similarly, in criticizing a decision protecting the confidentiality of a Catholic confession, he said he supported "the policy of protecting the secrets of auricular confession. But considerations of policy address themselves with propriety to the legislature, and not to a magistrate . . ." *Id.* at 417. He thus held that the state constitution did not *require* exemption, but he was equally clear in his view that it did not *prohibit* exemption.

Counsel for the defendant, arguing against the exemption, did not claim otherwise. They urged that an exemption would be unworkable, and that the constitutional guarantee of religious liberty was confined to "faith and religious worship" and did not affect "performance of a civil duty." *Id.* at 415. But they did not suggest that an exemption would establish anyone's religion. Similarly in other cases, to the extent we have either an opinion of the court or argument of counsel opposing a claimed exemption, we find a variety of arguments but no suggestion that the legislature could not provide exemptions or that such legislative exemptions would establish a religion.[28]

In the modern debate over whether regulatory exemptions are required, historically minded opponents of exemptions have argued that they were not required by the

[28] *See Commonwealth v. Drake*, 15 Mass. 161 (1818); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1815).

original understanding. But none of those scholars has argued that regulatory exemptions were forbidden by the original understanding, and none has cited a single instance of anyone in the founding generation arguing that regulatory exemptions were unconstitutional. Rather, their position is that exemptions were commonly granted but were thought to be a matter of legislative grace. Ellis West acknowledges that "exemptions from conscription laws were often granted to religious conscientious objectors before, during, and after the Revolution;" he attributes this to legislative "sympathy." West, *supra* note 16, at 375. Philip Hamburger argues: "[T]hat various state statutes (or even constitutions) expressly granted religious exemptions from military service or other specified civil obligations hardly suggests that such exemptions were rights under the United States Constitution."[29] Gerard Bradley makes an impassioned conceptual and originalist case against regulatory exemptions under the Free Exercise Clause, but insists that "Nothing in this idea (and nothing in the Constitution) prohibits relief from neutral, generally applicable laws for conscientious objectors *by legislative accommodation*."[30]

The only historically minded scholar who has in any way attempted to link regulatory exemptions to establishment is Philip Hamburger. He notes that religious dissenters attacking the privileges of the established church often argued for equal rights for all faiths. Hamburger, *supra* note 29, at 946. Then he claims that this equal-rights argument "had implications for exemption," because exemptions "could create unequal rights." *Id.* at 946-47. But this is Hamburger talking, not anyone from the eighteenth century. He has few examples of anyone attacking exemptions on these grounds --

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[29] Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 948 (1992).

[30] Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 262 (1991).

none that do so unambiguously and none that connect such an attack to an establishment of religion. Just as legislators could grant exemptions and support them on policy grounds without believing they were constitutionally required -- Hamburger's principal point -- so critics could oppose exemptions on policy grounds without believing they were constitutionally prohibited.

The few examples of eighteenth-century views in Hamburger's footnotes to this section do not support his effort to link exemptions with establishment. He quotes a 1777 Memorial of Virginia Presbyterians stating that "the concerns of religion, are beyond the limits of civil control," and that accordingly, the church should not "receive any emoluments from any human establishments for the support of the gospel." *Id.* at 946 n.117. "Emoluments" is clearly a reference to financial support, not regulatory exemptions. Hamburger also quotes the Baptist leader John Leland as the only pastor of the time to criticize the exemption of the *clergy* from taxation and military service. *Id.* at 947 n.119. But these exemptions were based on religious status, not on any religious belief that prevented compliance with the law. As Justice O'Connor has explained, this fundamental distinction helps reconcile exemptions with a strong principle of religious equality:

> What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discrimination based on sect.

Board of Education v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

This distinction was not explicitly developed in the eighteenth century, but it seems to have been implicit,

reconciling the rhetoric of equal rights with the practice of exemptions. This implicit distinction explains why the religious minorities that demanded equal rights for all faiths did not oppose regulatory exemptions on that ground, and why John Leland attacked privileges for the clergy as such but never attacked exemptions for conscientious objectors. Indeed, Hamburger elsewhere acknowledges that proponents of religious liberty often clarified broad rhetoric about equal rights and no laws taking cognizance of religion, insisting that government must also protect free exercise.[31]

There were nearly four million Americans alive in the 1780s. Somewhere, sometime, someone might have said something connecting regulatory exemptions with establishment. Such a quote might surface. But it is clear that such views were no significant part of the founding-era debate on religious liberty.

II. This Original Understanding Helps Explain and Confirm the Long Practice of Regulatory Exemptions and the Decisions Upholding Them.

This original understanding helps explain and confirm both American practice and Supreme Court precedent. From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions. A scholar using a Lexis search and sampling techniques estimated that there were 2000 religious exemptions on state and federal statute books in 1992.[32]

The case law is developed by Petitioners and other amici. We will not elaborate it here, except to note this

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[31] Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 Sup. Ct. Rev. 295, 344-45.

[32] James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445 & n.215 (1992). His search method appears to have included tax exemptions as well as regulatory exemptions.

Court's repeated unanimity on the general view that regulatory exemptions are at least constitutionally permitted.[33] Of course there are limits to this rule. A tax exemption was invalidated because there was no burden on religious practice to be relieved and the cost of the exemption burdened other taxpayers,[34] or because it involved a content-discriminatory tax on the press.[35] Regulatory exemptions are invalid if they are "absolute" and "take[] no account" of burdens on others in particular applications,[36] or if they are confined to a single sect or a single religious practice.[37] But nothing in these cases supports Ohio's claim that regulatory exemptions are facially invalid and that the prison provisions of RLUIPA are unconstitutional in all their applications.

The argument that regulatory exemptions implicate the Establishment Clause is relatively new. It grows from misapplication of broad language seeking to summarize the principles of disestablishment and free exercise. But if ripped from context and historical roots, such broad language can suggest results inconsistent with those principles. The validity of regulatory exemptions has perhaps not been explained in sufficient depth because the tradition of such exemptions has

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[33] *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 705-06 (1994); *id.* at 711-12 (Stevens, J., concurring); *id.* at 715-16 (O'Connor, J., concurring); *id.* at 722-27 (Kennedy, J., concurring); *id.* at 743-45 (Scalia, J., dissenting); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *id.* at 892-903 (O'Connor, J., concurring); *Tex. Monthly v. Bullock*, 489 U.S. 1, 18-19 n.8 (plurality opinion) (1989); *id.* at 28 (Blackmun, J., concurring); *id.* at 38-40 (Scalia, J., dissenting); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-39 (1987); *id.* at 341-46 (Brennan, J., concurring); *id.* at 346 (Blackmun, J., concurring); *id.* at 348-49 (O'Connor, J., concurring).

[34] *Tex. Monthly*, 489 U.S. at 19 n.8 (plurality opinion).

[35] *Id.* at 25-26 (White, J., concurring); *id.* at 28 (Blackmun, J., concurring).

[36] *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985).

[37] *See Grumet*, 512 U.S. at 702-05; *Thornton*, 472 U.S. at 712 (O'Connor, J., concurring).

been so long and so strong and their validity seemed so obvious to so many.

As understood by those in the founding generation who labored in the states on behalf of disestablishment, there was a material difference between support for organized religion (establishment, and a threat to religious liberty) and exemption for religious practice (liberty enhancing, whether or not required by free exercise). Exemptions are not a way of expanding the power of the dominant religion; they are a way of protecting religions that lack the political power to prevent legislation imposing substantial burdens on their religious practice. Government support makes a religion better off than it would have been if government had done nothing; regulatory exemptions relieve burdens imposed by government and leave the religion's adherents no better off than if government had not imposed the burden in the first place. Government does not establish a religion by leaving it alone.

Exemptions reduce social and political conflict and facilitate legislative compromise. If a proposed law conflicts with the religious obligations of a minority religion, the legislature may override the religious objection and enact the law for everybody; it may fail to enact the law at all; or it may enact the law and exempt those whose religious commitments conflict with the law. If the third option were constitutionally impossible, the choice between the first two options would force all out political warfare between the threatened religious minorities and the interest groups supporting the proposed law. A rule that legislatures cannot exempt burdened religious minorities can only exacerbate social conflict.

Exemptions are substantively neutral.[38] Exemptions remove burdens that discourage or penalize believers attempting to practice their faith, and properly administered, they do not encourage others to adopt the religious practice. Religious practices are often burdensome or meaningless to

[38] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561-63 (1993) (Souter, J., concurring).

nonbelievers; their meaning comes from religious faith. One does not adopt a kosher diet, or strictly observe the Sabbath, merely because it is permitted. Government permission matters only to those who are religiously motivated.

Occasionally religious faith coincides with secular self-interest, as in the case of exemptions from military service. In those cases, the exemption must be carefully structured to avoid encouraging or pressuring nonbelievers either to genuinely adopt or falsely claim the religious belief that would entitle them to exemption. In some cases, the most nearly neutral solution will be to deny the exemption. If a prisoner claimed a religious need to be out of his cell with freedom to roam the prison grounds, that claim would be denied not only because of the compelling interest in prison security, not only because the claim is almost certainly insincere, but also because such an attractive benefit would pressure other prisoners to join the new religion. It may be that in the confined world of prisons, where all freedoms and benefits depend on the will of prison authorities, such cases of inducement to nonbelievers will arise more often than in the free world. But the problem of religious claims that coincide with secular self-interest, like Ohio's other claims of problematic applications, must be addressed as they arise in real cases. Problems in specific applications do not come close to facially invalidating the historic practice of regulatory exemptions.

III. Federalism Interpretations of the Establishment Clause Do Not Invalidate RLUIPA.

In recent years there has a emerged a variety of arguments to the effect that the Establishment Clause was, in whole or in part, a provision to protect the surviving state establishments against federal interference. Ohio made no such argument below, but it says that it intends to make such an argument now. Br. in Response to Pet. for Cert. 11.

The Establishment Clause did not originally apply to the states, and choices concerning the establishment of religion at the state level were therefore left to each state. This is the important federalism point, but it was true of all provisions in the Bill of Rights. States could establish a church, but they were could also prohibit the free exercise of religion or take property without just compensation.[39]

The new "federalism" interpretations of the Establishment Clause make a much more ambitious and dubious claim. They assert not just that the Establishment Clause did not prohibit state establishments, but also that the Clause affirmatively protected state establishments, forbidding Congress to interfere with any surviving state establishment. Some versions of this argument suggest that the Establishment Clause *only* prohibits federal interference with state establishments, and that it creates no individual rights.[40] That interpretation would require that every Establishment Clause decision of this Court be overruled or rewritten on a new theory. It would leave both states and the federal government free to establish churches, and it would leave individuals with no remedy. Virginia has tried to avoid this problem by suggesting that the Establishment Clause protects individuals against establishments *and* prohibits federal interference with state establishments. Pet. for Writ of Certiorari, *Bass v. Madison* 12 (No. 03-1404). These new interpretations of the Establishment Clause are both unfounded and inapplicable to RLUIPA.

A. RLUIPA Is Not "a Law Respecting [Ohio's] Establishment of Religion."

Assuming that the Establishment Clause prohibits federal interference with state establishments, and assuming

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[39] *See Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589 (1845); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

[40] *See* Steven D. Smith, *Foreordained Failure* 17-54 (Oxford Univ. Press 1995).

that this meaning of the Clause survived ratification of the Fourteenth Amendment, none of this would cure the fundamental problem with Ohio's argument: regulatory exemptions are not a "law respecting the establishment of religion." As already explained, regulatory exemptions were never part of the establishment of religion, and requiring exemptions has no tendency to create an establishment.

Nor does RLUIPA interfere with any state establishment. Ohio does not claim, and could not claim, that its refusal to grant exemptions is part of a policy to establish some other religion. Ohio defends its refusal of exemptions on the secular ground that exemptions are burdensome to prison administration. It does not claim that its refusal of exemptions moves in any way, to even a slight extent, towards an establishment of religion. Nor does the grant of exemptions move toward establishment, because exemptions were no part of the establishment of religion.

B. The Text Does Not Support the Federalism Interpretation of the Establishment Clause.

The Establishment Clause provides that Congress shall make "no law *respecting* an establishment of religion" (emphasis added). "Respecting" means relating to or concerning. In 1789, there was no federal establishment, so at the federal level, the only imaginable laws relating to an establishment of religion would have been laws creating an establishment, or beginning to do so. This Court has therefore said that "a given law might not *establish* a state religion but nevertheless be one `respecting' that end in the sense of being a step that could lead to such establishment . . . ." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

But another meaning is also possible. A federal law interfering with a state establishment of religion would relate to that state establishment, and thus literally be "a law respecting [the state's] establishment of religion." This is the textual basis for the argument that the Establishment Clause prohibits federal interference with state establishments.

This meaning is linguistically possible, but there is no evidence that anyone intended it or even noticed the possibility. "[R]especting" was inserted by the conference committee without recorded explanation. 3 *Documentary History*, *supra* note 26, at 228. No one at the time mentioned any possible federalism meaning of "respecting." The brief recorded debate in the House reflected popular fear that the federal government might establish one or more national religions, 1 *Annals of Cong.* 758 (Aug. 15, 1789), but no fear that Congress might interfere with what remained of the state establishments.

Massachusetts, Connecticut, and New Hampshire (and Vermont, which would become a state in 1791), maintained tax supported churches, with each town choosing which church to support, and with exemptions permitting dissenters to pay their tax to their own church instead -- at least in theory, and sometimes in practice. *See* Curry, *supra* note 6, at 134-92. In the House debate on the Establishment Clause, Mr. Huntington of Connecticut feared that the Clause might lead federal *courts* to dismiss suits to collect Connecticut's mandatory "contributions" to churches. 1 *Annals of Cong.* 758 (Aug. 15, 1789). But this line of thought did not lead him or anyone else to worry that *Congress* might interfere with the New England establishments. No one else mentioned the New England systems, and no one argued for or against any federalism implications of the proposed amendment. The debate concerned the substance of what should be prohibited to the federal government.[41] None of the state proposals for amendments had raised any concern about federal interference with state establishments. Massachusetts and Connecticut refused to ratify the First Amendment.[42] Yet we are supposed

[41] 1 *Annals of Cong.* at 757-59. For analysis, *see* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 908 (1986).

[42] *See* Thomas J. Curry, *Farewell to Christendom* 42, 129 n.27 (Oxford Univ. Press 2001).

to believe that the Establishment Clause was drafted principally for their benefit and at the request of their representatives.

Many supporters of the New England systems denied that they maintained an establishment at all. Curry, *supra* note 6, at 172, 174-75, 189. It was mostly Baptists who charged New England with establishment, but there were no Baptists in Congress. *Id.* at 205. The Congregationalists who represented New England would at least have found it embarrassing to refer to their systems as "an establishment," and they might well have viewed it as ineffectual to try to protect those systems by forbidding federal interference with "an establishment."

A principal reason for the lack of alarm about federal interference with state establishments is that it is hard to imagine how Congress could have done such a thing.[43] Congress had no delegated power to enforce constitutional rights or individual liberties in the states; that would require a Civil War and the Reconstruction Amendments. The transportation and communication revolutions still lay in the future; any connection between locally assessed church taxes and interstate commerce would have been highly attenuated. The Spending Clause was available, but the Sixteenth Amendment was 125 years in the future; Congress had little money to spend. Surely no one contemplated taxing people in all the states to pay New England to abandon what was left of its establishment. Of course Anti-Federalists sometimes imagined the new federal government exceeding its powers and doing quite implausible things. But the delegations from the three states with tax supported churches were mostly Federalist supporters of the Constitution,[44] not disposed to such imaginings.

[43] *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 NYU L. Rev. 346, 408 (2002).

[44] For biographies of these delegations, see 14 *Documentary History*, *supra* note 26, at 489-525, 604-69.

In sum, a ban on federal interference with state establishments is a possible meaning of the text. But there is no reason to believe it was an intended meaning of the text, and much reason to believe it was not intended or even considered. In the context of the formation of a new government with no hint of an established religion, the more straightforward meaning of "respecting" is the one adopted by this Court -- the federal government was not to take any step towards an establishment.

C. The Original Understanding Does Not Support the Federalism Interpretation of the Establishment Clause.

Some who claim that the Establishment Clause was only about federalism make an original understanding argument. The claim is that the First Congress could not have agreed on either the desirability or the meaning of disestablishment. Smith, *supra* note 40, at 21. Hence the Establishment Clause could not create any substantive right to be free of establishments. It could only leave the question to the states.

But of course, the Founders did not have to agree on disestablishment. They had to agree only on what powers they were denying to the federal government -- and they had to agree on that only at a high level of generality. Opponents of all establishments could obviously support a ban on federal establishments. Those who supported state establishments might be less enthused about the sweep of the federal clause.[45] But despite such arguments at the margins of the Clause, supporters of state establishments had ample reason to oppose a federal establishment. No one in New England could

[45] Huntington's comments about not "patroniz[ing] those who profess no religion at all" suggest this concern, 1 *Annals of Cong.* 758 (Aug. 15, 1789), as does the apparent effort in the Senate to expressly confine the Clause to denominational preferences. *See Lee v. Weisman*, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring) (reviewing the drafting history).

plausibly want a federally established church competing with, or layered on top of, their state establishments. Nor could anyone in New England plausibly want an established church designated by Congress, where Congregationalists were not likely to predominate. The three states with tax supported Congregationalist churches in 1789 had only 16 of the 65 seats in the First Congress. U.S. Const., art. I, §3. Members did not have to resolve their disagreements about state establishments, and there was no significant disagreement about a federal establishment.

The political demand for the Establishment Clause did not come from supporters of the surviving establishments in New England, but rather from the dissenting churches who were successfully pursuing disestablishment in the states.[46] These dissenters had no interest in protecting the remains of New England's establishment. Their interest in the Establishment Clause was to be sure that establishment never got a foothold in the new federal government. This Court's interpretation of "respecting" is entirely consistent with their political goals.

D. Any Protection for State Establishments Has Been Superseded.

The campaign against establishments in the states continued after 1791. No new American state or territory formally established any religion, and all the New England states ended their tax support for churches by 1833. State courts largely disentangled the law from religious explanations.[47] Protestants came to oppose financial aid to "sectarian" schools on grounds of separation of church and

[46] *See* Douglas Laycock, *Religious Liberty as Liberty*, 9 J. Contemp. Legal Issues 313, 343-46 (1996).

[47] Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L.J. 1085, 1100-18 (1995).

state.[48] Some of the new state and territorial constitutions borrowed the language of the federal Establishment Clause,[49] obviously taking that language to mean a prohibition of establishments and not something about federal interference with states. By the time of the Fourteenth Amendment, the consensus against establishment of religion was nearly universal, leaving only disagreements about the boundaries of that principal.

No southern state had a formal establishment of a *church* in the nineteenth century, but they all effectively established a particular religious *teaching*. Lash, *supra* note 47, at 1136-41. They supported a pro-slavery version of Christianity and vigorously suppressed any contrary teaching. They narrowly restricted and closely monitored religion among the slaves, especially emphasizing Paul's teaching that "slaves be subject to your masters." *Id.* at 1138 n.235. Republicans charged the South with violating both Religion Clauses, and listed both among the rights to be incorporated. *Id.* at 1141-45. The Republican objection was not to federal interference with state establishments, but rather to state support for a religious teaching and state suppression of competing religious teachings. Incorporation of a ban on state establishment of religion is thus entirely plausible. Congress was given express power to enforce this ban on state establishments by appropriate legislation. U.S. Const., amend. XIV, §5. If once there had been a proscription on federal interference with state establishments, that proscription is inconsistent with the Fourteenth Amendment, and necessarily repealed.

Two of the most prominent scholars who defend a federalism understanding of the Establishment Clause in 1789 come to essentially this conclusion, although they avoid the word "repealed." Kurt Lash says the Establishment Clause was gradually reinterpreted to protect "freedom of

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[48] *See id.* at 1118-25; Douglas Laycock, *The Many Meanings of Separation*, 70 U. Chi. L. Rev. 1667, 1678-81 (2003).

[49] Akhil Amar, *The Bill of Rights* 259 (Yale Univ. Press 1998).

conscience," so that by 1868 it "was understood to be a liberty as fully capable of incorporation as any other." Lash, *supra* note 47, at 1154. Akhil Amar says that modern nonestablishment principles are part of the Fourteenth Amendment either through direct incorporation or as part of the rights to free exercise, equal protection, and equal citizenship. Amar, *supra* note 49, at 252-54.

These scholars see the Establishment Clause transformed by the Fourteenth Amendment. For those who believe the Establishment Clause was an individual liberty provision from the beginning, no great transformation is required. Either way, the conclusion is the same. At least since the Fourteenth Amendment, the Establishment Clause has protected individual liberty against state laws respecting an establishment of religion. Whether or not it ever protected state establishments from Congress, it does not do so now.

E. There Is No Basis for Virginia's Argument That Congress Is Barred from Taking Any Action Affecting Religion.

Virginia has tried to escape all these problems by offering a new version of the federalism argument. Virginia claims that Congress is wholly forbidden to act on the subject of religion. Cert. Pet. 12, in *Bass v. Madison* (No. 03-1404). Congress cannot violate the Establishment Clause, it cannot violate the Free Exercise Clause, *and* it cannot enact any other legislation concerning religion, even if it violates neither Clause.

This remarkable argument abandons any link to the constitutional text. Indeed, Virginia implies that Congress is most disabled precisely in the "play in the joints" where this Court says a law violates neither of the two Religion Clauses. *Id.* at 14. This argument is apparently designed to avoid the fact that regulatory exemptions have nothing to do with establishment. Exemptions have something to do with religion, and thus Virginia says, Congress cannot enact them.

For this argument to apply to RLUIPA, it must apply even to the Spending Clause. Virginia necessarily claims not merely that Congress cannot *mandate* religious exemptions in the states, but also that it cannot *encourage* religious exemptions by offering money to states that provide them.

The First Congress rejected the only draft amendment that might have given this interpretation some plausibility. Samuel Livermore of New Hampshire moved for the Clause to read: "Congress shall make no laws *touching religion*, or infringing the rights of conscience." 1 *Annals of Cong.* 759 (Aug. 15, 1789) (emphasis added). The Committee of the Whole briefly adopted Livermore's proposal, *id.*, but the House soon replaced it with a substitute. *Id.* at 796 (Aug. 20, 1789). The Amendment ultimately adopted does not prohibit laws touching or respecting "*religion*," but only laws respecting "*an establishment* of religion." This textual difference is precisely what Virginia seeks to elide. Justice Souter has accurately noted that "Livermore's proposal would have forbidden laws having anything to do with religion and was thus not only far broader than Madison's version, but broader even than the scope of the Establishment Clause as we now understand it," citing regulatory exemptions as an example that would have violated Livermore's proposal but does not violate the Establishment Clause.[50]

Virginia relies not on constitutional text, nor on specific explanations of that text, but rather on broad statements that the federal government had no power to meddle with religion. These statements were mostly shorthand for the real issue in dispute -- that Congress had no power to burden or interfere with religious liberty. Beyond that, such rhetoric is partly the familiar Federalist argument that a Bill of Rights was not needed, and partly a reflection of the much narrower scope of federal powers at the time. But it is not a basis for interpreting the First Amendment.

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[50] *Lee v. Weisman*, 505 U.S. 577, 612-13 (1992) (Souter, J., concurring).

Congress has never acted as though it were barred from any law touching religion -- not in the beginning and not now. Congress reenacted the Northwest Ordinance, with its provision guaranteeing religious liberty in the Northwest Territory.[51] Early Congresses paid churches to send teachers to Indian tribes.[52] Congress guaranteed "the free enjoyment of their . . . religion" to residents of the Louisiana Purchase.[53]

Even if Virginia's argument were confined to federal legislation affecting the states, its consequences would be vast. Congress could not include church-affiliated schools in federal programs to aid education. Nor, presumably, could Congress exclude such schools. Nor could Congress provide that if such schools participated, they could not use the funds for purely religious purposes.[54] Congress could not prohibit religious discrimination in employment by state and local governments.[55] Congress could not protect religious speech in the Equal Access Act,[56] and perhaps it could not protect any speech in any Act, because there are also founding-era statements that Congress lacked all power over speech. For example, James Madison said that "the liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States."[57]

But there is more. The core of Virginia's argument is not that the Establishment Clause especially protects the states,

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[51] 1 Stat. 50 (1789). Within note (a) beginning at 51, see Article I at 52 for the religious liberty provision.

[52] *See* Robert L. Cord, *Separation of Church and State* 53-80, 261-70 (Lambeth Press 1982).

[53] Act of Oct. 31, 1803, ch. 1, §2, 2 Stat. 245.

[54] *But see Mitchell v. Helms*, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring) (relying on such a requirement).

[55] *See, e.g.*, 42 U.S.C. §2000e-2(a) (2000).

[56] *But see Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (upholding the Act).

[57] James Madison, *Report on the Virginia Resolutions* (Jan. 18, 1800), reprinted in 5 *The Founders' Constitution* 141, 146 (Philip Kurland & Ralph Lerner, eds., Univ. of Chicago Press, 2d ed. 2000).

but that Congress lacks all power over religion. But if Congress lacks all power over religion, any legislation touching religion is invalid whether or not it also touches states. Congress could not prohibit religious discrimination in private employment, or even in federal employment. Congress could not exempt conscientious objectors from military service or from any other federal law. Congress could not enact tax exemptions for churches in the District of Columbia -- but neither, perhaps, could it tax them. The view that Congress simply cannot act with respect to religion is not even coherent.

The "federalism" theory of the Establishment Clause has recently been subjected to devastating reviews by law professor Noah Feldman, *supra* note 43, at 405-12, and historian Thomas Curry, *supra* note 42, at 41-44, 128-30 & nn.24-33. Curry concludes that the theory "belongs entirely to the world of logical distinctions and has no connection with the world of history." *Id.* at 129 n.28. More fundamentally:

> A majority of Americans came to believe that for government to withdraw from religious affairs would be good for both Church and State. To reduce this movement . . . to a scheme to protect the dying remnants of the petty tyrannical New England Church-State systems represents a lamentable loss of historical wisdom.

Id. at 43-44. This Court should not make the same mistake.

CONCLUSION

The judgment should be reversed.

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IN THE

Supreme Court of the United States

JON B. CUTTER, *et al.*,

Petitioners,

v.

REGINALD WILKINSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici Curiae States of New York and Washington urge reversal of the decision of the United States Court of Appeals for the Sixth Circuit in *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003). That decision struck down section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, which prohibits states from imposing a substantial burden on the religious exercise of a prisoner or other institutionalized person unless the imposition is the least restrictive means of furthering a compelling government interest. The court held that this provision has the primary effect of advancing religion in violation of the Establishment Clause of the First Amendment because it gives religious prisoners superior rights in the prison community and encourages prisoners to become religious. 349 F.3d at 264-67.

Amici States have a strong interest in ensuring that state prisons are operated safely and effectively. They also believe that federal courts should defer to state prison administrators' expertise in the day-to-day operation of prison systems. At the same time, Amici States value the religious liberty of all of their citizens, including those who are incarcerated. Religious tolerance is among the foundations of our society, and religious accommodation "follows the best of our traditions" by promoting respect for individuals' freedom of conscience. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Amici States believe that they should be free to remove unnecessary state-imposed burdens on their citizens' religious practice, even if not required to do so by the Constitution.

New York, for example, allows a religious organization to give preference to members of its religion, notwithstanding

the general law against discrimination. N.Y. Executive Law § 296(11). Similarly, it provides sequestered jurors with food that meets their religious dietary requirements. N.Y. Judiciary Law § 519-a. And it allows voters who have religious objections to polling places located in churches to vote elsewhere. N.Y. Election Law § 11-300. Indeed, at least a dozen states have adopted measures, including some similar to RLUIPA, to ensure that state action burdening a religious practice is the least restrictive means of achieving a compelling state interest.[1] If the government could not review its own actions to eliminate substantial burdens on religious practices, the constitutionality of these state laws would be called into question.

Amici States believe that when properly construed, section 3 of RLUIPA strikes a workable balance between the interests in safe and effective prisons on the one hand and religious freedom on the other. While promoting accommodation of prison inmates' religious practices, section

1. These states include Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. *See* Ala. Const. Amend. 622; Ariz. Rev. Stat. § 41-1493.01; Conn. Gen. Stat. § 52-571b; Fla. Stat. Ann. § 761.03; Idaho Code § 73-402; 775 Ill. Comp. Stat. Ann. 35/15; N.M. Stat. Ann. § 28-22-3; Okla. Stat. Ann. tit. 51, § 253; Pa. Stat. tit. 71, § 2404; R.I. Gen. Laws § 42-80.1-3; S.C. Code Ann. § 1-32-40; Tex. Civ. Prac. & Rem. Code Ann. § 110.003. A number of other states, including Alaska, Massachusetts, Washington, and Wisconsin, have adopted a similar rule judicially. *E.g.*, *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Munns v. Martin*, 930 P.2d 318 (Wash. 1997); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996).

3 properly requires courts to defer to the considered judgment of prison administrators in assessing the feasibility of any requested accommodation. As Amici States interpret the provision, prison administrators do not need to provide accommodations that would compromise the prison's interests in order, security, discipline, or a host of other vital institutional concerns.

Undeniably, as the State of Ohio's submission below suggests, section 3 of RLUIPA has generated frivolous suits by prisoners, a burden all states bear. This litigation burden is exacerbated when some lower courts disregard Congress's intent that they defer to the experience and expertise of prison administrators. The solution, however, is not to hold that section 3 violates the Establishment Clause on its face, which would have far-reaching consequences for religious accommodation generally. Legislation such as the Prison Litigation Reform Act of 1995, when applied consistently, will deter frivolous suits. Guidance from this Court on the scope of section 3, and the proper way to balance the competing interests addressed by the provision, will also minimize the states' burden in RLUIPA litigation without compromising prison administrators' ability to accommodate genuine religious practices.

SUMMARY OF ARGUMENT

This Court has long approved of voluntary efforts by states to accommodate the religious practices of their citizens. Accommodation falls within the "play in the joints," *Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307, 1311 (2004), between what the Free Exercise Clause commands and what the Establishment Clause forbids. When the state goes beyond the minimum required by the Free Exercise Clause and lifts

government-imposed burdens on religious exercise, the Establishment Clause does not require that it simultaneously provide benefits to non-religious activities.

Properly construed, section 3 does not endorse religion. It does not promote religious practices that are unburdened by government rules, discriminate among religious sects, demand accommodations that unduly burden other prisoners or the prison system, or require accommodations that would induce prisoners to adopt religious beliefs. The Sixth Circuit vastly overstated the scope of section 3's duty to accommodate when it speculated that the provision would encourage prisoners to become religious to enjoy greater rights.

The scope of section 3 is also limited in another important way. Congress intended the courts to defer to the experience and judgment of state prison administrators in determining what accommodations are feasible in the prison setting. There is a long tradition of deference on prison matters that, when applied faithfully, minimizes the burden of section 3 litigation on the states. The legitimate concerns about security and resources that Ohio raises are fully addressed by application of section 3's flexible balancing test in a manner that reflects an appropriate level of deference.

ARGUMENT

POINT I

SECTION 3 OF RLUIPA DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION

A religious accommodation is constitutional under the Establishment Clause if it serves a secular legislative purpose, has a primary effect that neither advances nor inhibits religion, and does not entangle church and state excessively. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-39 (1987) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). The Sixth Circuit found that section 3 failed this test because it has the primary effect of advancing religion. 349 F.3d at 264-67. This is so, according to the court, because the provision "giv[es] religious prisoners rights superior to those of nonreligious prisoners" by making it easier for prisoners to prevail on claims for religious accommodation than on other claims regarding fundamental rights. *Id.* at 266. The court also speculated that the prospect of these superior rights would "encourag[e] prisoners to become religious in order to enjoy greater rights." *Id.* As discussed below, the Sixth Circuit is wrong.

A. Section 3 Requires Only Religious Accommodation, Not Promotion of Religious Practices Unburdened by the State.

Contrary to the Sixth Circuit's suggestion, a law does not run afoul of the Establishment Clause simply because it lifts a government-imposed burden on religious exercise without simultaneously providing benefits to non-religious

activities. *Amos*, 483 U.S. at 338 ("Where, as here, government acts with the purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."). Religious accommodation — that is, "relieving people from generally applicable rules that interfere with their religious callings," *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J., joined by Stevens and O'Connor, JJ., concurring) — is quite different from government efforts to promote a religious practice that is unburdened by government rules. *Id.* at 627-29. Although section 3 grants exemptions to religious adherents that are not available to non-practitioners, this is a facet of any religious-accommodation scheme, including those that this Court has held to be constitutional. *See, e.g.*, *Amos*, 483 U.S. at 338 (holding constitutional the exemption of religious organizations from the federal ban on religious discrimination in employment); *Gillette v. United States*, 401 U.S. 437, 454 (1971) (holding constitutional the conscientious-objector exemption from military service); *Zorach*, 343 U.S. at 312 (holding constitutional a public school's practice of releasing students for off-site religious education).

Section 3 constitutes permissible religious accommodation because it requires accommodation only when the government has imposed a substantial burden on the inmate's religious exercise. It does not require special consideration for religious practices that are unburdened by the state. Rather, it simply allows practitioners to carry out their faith. *See Amos*, 483 U.S. at 337 ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose.").

Thus, section 3 is unlike the law at issue in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), which exempted religious publications promulgating teachings of the faith from the state

sales tax. As the plurality noted, the law provided a subsidy to religion that could not "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15. There was no evidence in that case that payment of the sales tax violated the religious beliefs of adherents or inhibited their religious activities. *Id.* at 18.

Moreover, section 3 applies equally to all religious practices, broadly covering "any exercise of religion." 42 U.S.C. § 2000cc-5(7)(A). No religious sect is privileged over another, nor is any specific religious practices singled out for special treatment. It is thus unlike the law in *Larson v. Valente*, 456 U.S. 228, 246 (1982), which created an impermissible interdenominational preference by imposing greater requirements on religious groups that solicited most of their funds from nonmembers than on other religious groups.

B. Section 3, Properly Applied, Will Not Induce Non-Adherents To Adopt Religious Beliefs.

The Sixth Circuit's fear that section 3 will induce inmates to become "religious" is unfounded. To begin with, section 3 does not reward prisoners who profess sham religious beliefs in order to gain rights not available to non-adherents. The law (consistent with standards arising from First Amendment jurisprudence) requires a prisoner to establish, as a threshold matter, that he or she sincerely holds the alleged religious belief. *See, e.g.*, *Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3d Cir. 1986) (affirming district court's finding that plaintiff did not sincerely believe in congregational prayer); *Theriault v. Carlson*, 495 F.2d 390, 394-95 (5th Cir. 1974) (remanding for district court to determine whether plaintiff's alleged religious beliefs were sincerely held);

Johnson v. Pa. Bureau of Corr., 661 F. Supp. 425, 437 (W.D. Pa. 1987) (holding that plaintiff did not sincerely believe in Muslim faith). Prisoners who purport to hold religious beliefs simply to gain additional rights will not be entitled to accommodation, because these sham beliefs are, by definition, not sincerely held.

Moreover, section 3 simply does not require accommodations giving religious prisoners such "superior rights" that their prospect would induce non-practitioners to adopt religious beliefs. Even under the strict-scrutiny standard, it is unlikely that prison officials would be required to provide accommodations only to religious prisoners where those accommodations would be highly desirable to non-religious prisoners as well, or where the accommodations would unduly burden non-adherents.

Applying a strict-scrutiny standard, this Court has refused to require accommodations that are likely to be in wide demand. For example, in *United States v. Lee*, 455 U.S. 252, 257-60 (1982), this Court refused to create religious-based exemptions to paying social security taxes, because virtually everyone would want such an exemption. Similarly, this Court refused to create an exemption to mandatory military service for religious-based objections to a particular war, noting that such an exemption might "weaken the resolve of those who otherwise would feel themselves bound to serve." *Gillette*, 401 U.S. at 459; *cf. TWA v. Hardison*, 432 U.S. 63, 80 (1977) (under religious-accommodation requirement of employment-discrimination law, private employer is not required to bump more senior employee from employee's preferred shift to accommodate religious practices of another employee). Other courts have reached similar results under state or federal religious-freedom laws requiring strict

scrutiny. *See, e.g., Larson v. Cooper*, 90 P.3d 125, 132-33 (Alaska 2004) (refusing to create a religious exemption to prison's policy on contact visits under the state constitution in part because other prisoners would inevitably demand similar exemptions); *State v. Balzer*, 954 P.2d 931, 941 (Wash. App. 1998) (refusing to create a religious exemption to marijuana laws under the state constitution because doing so would "encourage enlistment in those religions [that mandate marijuana use] for the wrong reasons"); *Hamilton v. Schriro*, 74 F.3d 1545, 1555 (8th Cir. 1996) (holding that prisoner was not entitled to construction of a sweat lodge under the federal Religious Freedom Restoration Act in part because of the potential effect on other inmates).

Instead, the accommodations that section 3 requires are by their nature likely to be of little value to anyone other than sincerely religious adherents. For example, courts have held that in the absence of other compelling interests such as excessive cost, Jewish prisoners are entitled to kosher meals. *See McEachin v. McGuinnis*, 357 F.3d 197, 203 & n.7 (2d Cir. 2004) (citing cases on religious dietary rules in prisons). As one commentator has noted, "[a]llowing Jewish prisoners a special diet will not encourage kosher eating (as long as the alternative meals are no better than the standard fare)." Michael W. McConnell, *Accommodation of Religion*, 60 Geo. Wash. L. Rev. 685, 701 (1992). Similarly, in the absence of security concerns or other compelling interests, section 3 might require a prison to allow access to religious texts and objects because such access would be of little value to nonbelievers. *See, e.g., Sutton v. Rasheed*, 323 F.3d 236, 253-58 (3d Cir. 2003) (holding that prisoners were entitled to religious literature under the First Amendment).

The risk that inmates will adopt (or purport to adopt) religious beliefs simply to obtain religious accommodations that other inmates are receiving is therefore low. Properly construed, section 3 merely allows those who hold sincere religious beliefs to exercise those beliefs without interference by the state. If section 3 has any effect at all of advancing religion, that effect is quite plainly secondary and due solely to the autonomous choices of prisoners.

POINT II

SECTION 3 IS INTENDED TO BE APPLIED WITH DEFERENCE TO THE CONSIDERED JUDGMENT OF STATE PRISON OFFICIALS

In its response to the petition for a writ of certiorari, Respondent State of Ohio stated that it had submitted in the court below a "comprehensive record of the real-world effects of RLUIPA in prisons." Br. in Response to Petition for a Writ of Cert. at 12. According to Ohio, RLUIPA imposes burdens upon prison officials and inmates, "who must face the security problems that result from RLUIPA's imposition." Br. in Response to Petition for a Writ of Cert. at 12. To be sure, the "real-world effects" of RLUIPA, and particularly lower courts' failure to defer to the considered judgment of prison officials, are a concern for all states. Section 3, however, does not require prison officials to offer accommodations that would compromise security, undermine discipline, demand excessive use of scarce resources, or prejudice the rights of other inmates. Rather, it calls for deference to the judgment of prison officials about these matters.

The legislative history leaves no doubt that Congress intended to limit section 3 in this manner. Section 3 is patterned after the Religious Freedom Restoration Act (RFRA). *See* 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady); 146 Cong. Rec. S7774 (joint statement of Sens. Hatch and Kennedy) (daily ed. July 27, 2000). RFRA, in turn, was intended to restore the standard that this Court applied in prison litigation before *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). *See* S. Rep. No. 103-111, at 10 (1993) ("The intent of the act is to restore traditional protection afforded to prisoners' claims prior to *O'Lone*, not to impose a more rigorous standard than the one that was applied."), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899; *see also* 139 Cong. Rec. S14362-65 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch). The pre-*O'Lone* standard was a form of strict scrutiny that gave strong deference to the judgment of state prison officials. *See Turner v. Safley*, 482 U.S. 78, 86-89 (1987) (surveying the Court's pre-1987 jurisprudence).

Congress explicitly endorsed this standard in enacting RLUIPA:

> The committee expects that courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.

146 Cong. Rec. at S7775 (joint statement of Sens. Hatch and Kennedy). The legislative history of RFRA similarly emphasizes the need for deference in the unique context of

prison management. Congress expressly disclaimed any standard that "would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner." S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. at 1899-1900. It intended that the courts apply the statutory standard in a "flexible" manner that is "sensitive to the demands of prison management." *Id.* at 11, 1993 U.S.C.C.A.N. at 1900-01. *See generally Lawson v. Singletary*, 85 F.3d 502, 508-11 (11th Cir. 1996) (examining legislative history of RFRA and concluding that deferential pre-*O'Lone* standard governs).

Deference is required at both stages of the analysis. First, the courts must defer to prison officials' judgment about what state interests are "compelling" in the prison setting. Thus, for example, security and discipline are both well-established compelling interests. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (holding that "maintaining institutional security and preserving internal order and discipline are essential goals" in the prison setting); *see also* 139 Cong. Rec. S14364 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (noting that "order, safety, and discipline" are compelling government interests in prison context); 139 Cong. Rec. S14466 (daily ed. Oct. 27, 1993) (statement of Sen. Hatfield) ("[a]ctivities that are dangerous or jeopardize discipline would still be subject to restriction under the compelling interest standard").

Second, courts must defer to the prison officials' judgment about the least restrictive means to serve these interests. *See Bell*, 441 U.S. at 547 ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline

and to maintain institutional security."). Thus, prison officials are not required to show with "certainty" that the policy is necessary to avoid some adverse outcome. *Procunier v. Martinez*, 416 U.S. 396, 414 (1974). Indeed, a prison's policy may pass the test of strict scrutiny even if there are, at least in theory, other "reasonable" ways of dealing with a situation. *Bell*, 441 U.S. at 554. Unless there is "substantial evidence in the record" that the officials have "exaggerated their response," the courts should defer to the prison administrators' decision. *Id.* at 548.

Importantly, the judgment about whether to provide a particular accommodation is made in the first instance by state prison officials. A prisoner may not sue under RLUIPA without first exhausting all available administrative remedies. 42 U.S.C. § 1997e(a), 2000cc-2(e); *see Porter v. Nussle*, 534 U.S. 516, 520 (2002). Thus, courts considering a suit demanding a religious accommodation will always have the benefit of the state prison officials' judgment, and can defer accordingly. Consistent with the principle of deference, RLUIPA also allows the state to exercise its discretion in choosing the method of accommodating a religious practice. 42 U.S.C. § 2000cc-3(e).[2]

2. Section 2000cc-3(e) provides:

> (e) Governmental discretion in alleviating burdens on religious exercise.
>
> A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

As Congress intended, the cases in which prisoners should prevail under section 3 are those challenging "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations." 146 Cong. Rec. at S7775 (joint statement of Sens. Hatch and Kennedy). To the extent that RLUIPA increases the state's obligation to accommodate religious practices, it does so with an eye towards preserving the traditional deference to the judgment of state prison officials.

A recent example from New York illustrates the role of deference in RLUIPA litigation. *See Marria v. Broaddus*, No. 97 civ 8297, 2004 U.S. Dist. LEXIS 14829 (S.D.N.Y. July 30, 2004), *appeal docketed*, No. 04-5538-pr (2d Cir. Oct. 19, 2004). *Marria* concerned an adherent of the Nation of Gods and Earths, a group commonly referred to as "Five Percenters." *Id.* at *1. After determining in the face of conflicting evidence that the Nation of Gods and Earths constituted a genuine religion, the court remanded the matter to the New York State Department of Correctional Services and deferred granting the relief requested by the inmate. *Id.* at *1-2. The court did so because it recognized that the Nation of Gods and Earths might be both a religion and a gang, in which case accommodation would implicate prison security. *Id.* at *5. In keeping with the tradition of deference and comity, the court asked the *prison* to determine, in the first instance, whether and how to accommodate the group's religious practices. *Id.* at *2-3 & n.2.

When the state prison officials submitted proposed protocols allowing adherents of the Nation of Gods and Earths access to certain literature and one-on-one meetings between inmates and outside volunteers affiliated with the

group but not allowing any group meetings or services, the court approved the protocols in their entirety. *Id.* at *3-4. In deferring to the prison administrators' judgment, the court noted that they had demonstrated that the requested group meetings would pose serious security and discipline problems, as well as financial hardship. *Id.* at *5-7. The court thus appropriately deferred to the officials' judgment about which practices could be accommodated and which could not, consistently with the prison's security interests and limited resources.

To be sure, some courts may fail to give the appropriate level of deference intended by Congress, making it more difficult for state prison administrators to run safe and efficient facilities. But that by itself does not make the statute constitutionally infirm. In any event, Ohio's primary concern seems not to be that the courts are requiring it to provide accommodations that compromise security. Rather, the "comprehensive record of the real-world effects of RLUIPA in prisons" that Ohio has compiled principally discusses the administrative resources expended in responding to prisoners' requests for accommodation and especially the ensuing litigation. *E.g.*, Aff. of David Schwartz, Religious Services Administrator for the South Region of the Ohio Department of Rehabilitation and Correction (Oct. 19, 2000) ¶¶ 3-4 (noting the increase in time spent responding to litigation and consulting staff on legal matters); Mem. from Kim Tucker, Deputy General Counsel, to Robert A. Butterworth, Attorney General of the State of Florida (July 19, 1996) (summarizing the preliminary results of a national survey and noting the increased cost in evaluating and litigating claims).

While frivolous prisoner litigation certainly burdens the state's administration of its prison system, it is not a basis for striking down section 3 on its face. Notably, suits under RLUIPA are subject to the Prisoner Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321. *See* 42 U.S.C. § 2000cc-2(e) (stating that nothing in RLUIPA shall be construed as amending or repealing the PLRA). Among other things, the PLRA requires mandatory exhaustion of administrative remedies, 42 U.S.C. § 1997e(a); requires a prisoner to pay the full filing fee for a lawsuit or appeal, 28 U.S.C. § 1915(b); limits the availability of money damages, 42 U.S.C. § 1997e(e); requires that prospective relief be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary," giving "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief," 18 U.S.C. § 3626(a)(1)(A); and allows a court to revoke a prisoner's good-time credit for presenting false information to the court, 28 U.S.C. § 1932. No one contends that these provisions have eliminated the problem of frivolous prisoner lawsuits. But this problem is best addressed through legislation like the PLRA, not by reading the Establishment Clause so broadly as to prevent governments from accommodating genuine religious practices.

CONCLUSION

For the foregoing reasons, Amici States respectfully request that this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit.

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JON B. CUTTER, ET AL.,

Petitioners,

v.

REGINALD WILKINSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether Congress violated the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 through § 2000cc-5, which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control.

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INTEREST OF *AMICUS CURIAE*[1]

This case presents significant questions about the power of the legislative branch to make legal remedies available to persons seeking to exercise religious freedom guaranteed by the First Amendment of the United States Constitution. The Sixth Circuit has invalidated the Religious Land Use and Institutionalized Persons Act of 2000, which provides a legal remedy for incarcerated persons to challenge burdens on religious practice in prisons receiving funds appropriated by Congress. This case thus presents important questions not only about the extent to which Congress may establish conditions on the use of Federal funds as part of its exercise of the Spending Power and to regulate interstate commerce under the Commerce Power, but equally important questions as to Congress' power to provide for the General Welfare by accommodating inalienable rights of religious freedom. The outcome of this case also bears on social policy related to the compassionate edicts of many religious traditions, including the Judeo-Christian tradition, to "remember those in prison as if you were their fellow prisoners and those who are mistreated as if you yourselves were suffering" and "let the sighing of the prisoner come before thee." Heb. 13:3 (NIV), Ps. 79:11 (KJV).

Amicus Curiae — The Rutherford Institute — has as one of its principal purposes the elimination of governmental discrimination against persons or groups based on their religious beliefs. The resolution of the issues presented in this case is not only important to the jurisprudence of the Spending

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[1] Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part. The attorney-authors of this Brief (as shown on the cover thereof) wish to acknowledge the assistance of Heather D. Gebelin, a third-year law student at the University of Pennsylvania Law School, in the preparation of this Brief.

and Commerce Clauses, but also to the extent to which Congress may accommodate the legitimate state interest in promoting religious freedom under the First Amendment, even for persons whose freedom has otherwise been restricted or limited as a consequence of anti-social conduct. The case is vitally important to the proper protection and balance of the inherent rights and liberties of humankind, as well as those granted to citizens under the Bill of Rights.

The Rutherford Institute is a non-profit civil liberties organization named for Samuel Rutherford, a 17th-century Scottish theologian and Rector at St. Andrew's University. With its national office in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants in the 50 states and to participate in significant cases that relate to and/or affect the Free Speech and the Religion Clauses of the First Amendment. Counsel for *amicus curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioners, Jon Cutter, *et al.*

SUMMARY OF ARGUMENT

Even from colonial days and during the long period of established religion in the states (*after* the adoption of the Bill of Rights), legislative bodies in the United States recognized the special need for the benevolent protection of religious exercise. Prisoners of society were no exception to this protection. Though sometimes jailed for the very beliefs they sought to propagate, preachers were permitted to practice their religious beliefs behind bars. Importantly, such actions

occurred in Virginia, the home state of James Madison, the principal author of the First Amendment. Madison was acutely aware of these infringements on liberty. Indeed, he advocated protection for what he viewed as inalienable rights of religious conscience that were "precedent both in order of time and degree of obligation, to the claims of Civil Society."

Today, the Congress of the United States has affirmed the importance of these rights by granting prisoners a procedural remedy to protect religious liberties from infringement based on the whims and personal fancies of correctional personnel. In doing so, Congress is advancing the general welfare of prisoners, insuring that congressionally appropriated funds are not used to deny protected liberties, and safeguarding for all citizens the interest of religious freedom that the Framers identified as special in the First Amendment. The protected rights, if vindicated in individual cases, will also advance important purposes of rehabilitation, personal motivation and the advancement of moral standards in the prison environment.

This Court has held time and again that the state does not endorse every action that it permits or protects. Moreover, refraining from government "endorsement" of religion does not require callous indifference to the religious rights of the citizenry. Under the Constitution, Congress may choose to safeguard the individual exercise of protected religious liberties without violating the Establishment Clause. The holding of the Sixth Circuit to the contrary — in conflict with several well-reasoned holdings among the other Circuits — is out of step with this Court's precedents. At bottom, there is "play in the joints" in the interaction of the Religion Clauses, particularly where prisoners, on their own initiative in individual cases, are permitted to seek review of burdens imposed on religious freedom in highly controlled prison environments. This Court should not prohibit such *legislative* accommodation of constitutionally protected religious liberties

against burdens imposed by otherwise neutral laws of general applicability or arbitrary actions of prison officials.

ARGUMENT

I. INTRODUCTION.

This case arises at the intersection of the legitimate interests underlying the Free Exercise and Establishment Clauses. The central issue is whether the legal remedy provided to incarcerated persons under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") as a means of protecting their rights to religious freedom transgresses the proscriptions of the Establishment Clause. Congress enacted this remedy for prisoners in a highly controlled environment where the mix of force and the personal predilections of officials has produced demonstrable infringements on religious liberty. This brief will comment on the origins of the inalienable right to religious freedom (singled out for special protection by the Bill of Rights from most other fundamental rights) and the relevance of the Framers' views on those liberties. It will then suggest, in the context of the protected right, that the Establishment Clause does not bar Congress from enacting the remedy provided by RLUIPA.

II. THE LEGITIMATE STATE INTEREST IN ACCOMMODATING THE FREE EXERCISE OF RELIGION.

In their separate opinions in *City of Boerne v. Flores*,[2] Justices O'Connor and Scalia presented disparate views concerning the historical interests underlying the Free Exercise Clause and whether judicial accommodation of religious practice is constitutionally mandatory when neutral laws of

[2] 521 U.S. 507 (1997).

general applicability infringe religious exercise.[3] That question is *not* presented in this case. Rather, the question is whether Congress, in recognizing the special significance of the free exercise of religion as a legitimate constitutional and societal interest, *may* make available to prisoners a procedural remedy requiring prison administrators to justify restrictions placed on religious exercise in federally funded prisons. In this vein, it is significant that Justices O'Connor and Scalia have both acknowledged a historical tradition of *legislative* accommodation of religious exercise at the time of the adoption of the Bill of Rights. *Id.* at 541, 557-560.

[3] Justice O'Connor marshaled extensive evidence showing that at the time of the adoption of the Bill of Rights, free exercise principles had an established history and a well-defined meaning in most of the colonies and in early state constitutions. In her view, "it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses." *Id.* at 560 (O'Connor, J. dissenting). Justice Scalia disputed whether the meaning ascribed to the latter enactments actually provided substantive meaning to the newly adopted Free Exercise Clause and as ratified by the states. He suggested that the most telling failure in Justice O'Connor's accommodationist position was the lack of "a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation." *Id.* at 542 (Scalia, J. concurring). The paucity of such cases may be not so much testament to the failure of the Free Exercise Clause, as a shield against general laws of neutral applicability, but to the function of the Establishment Clause as a structural bar to the Federal regulation of religion or other individual rights. Given several state-established churches that continued for decades in the new union (with the last being dissolved in Massachusetts in 1833), religion was very clearly understood to be a matter for regulation by the states, not by the Federal government. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 255, n.20 (1963) (Brennan, J. concurring); *Wallace v. Jaffree*, 472 U.S. 38, 99, n.4 (1985) (Rehnquist, J. dissenting); Daniel L. Dreisbach, *Thomas Jefferson and The Wall of Separation Between Church and State* 55-70 (2002); Phillip Hamburger, *Separation of Church and State* 155-180, 481-486 (2002).

A. Religion and Prisons in James Madison's Virginia

Part of the unnoticed history of the origins of Free Exercise includes its early roots in colonial prisons. James Madison was the principal framer of the First Amendment, including the Free Exercise Clause.[4] Madison's strongly held views on religious freedom were not only the product of theological training at Princeton University (under its President, John Witherspoon, who was one of the signers of the Declaration of Independence), but also the result of his own personal experience with religious persecution in Virginia. There, he was not only a witness to religious persecution, but personally involved as an advocate in many cases.

During the time following the Great Awakening in the Colonies in the 1740s, Colonial Virginia experienced a spate of religious persecution fostered by the arrival of Presbyterians and Baptists in what otherwise had been a secure haven controlled by the Church of England. These preachers were not welcome in the established church and could not obtain

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[4] Fellow Virginian Thomas Jefferson often erroneously associated with the drafting and adoption of the First Amendment (*see Reynolds* v. *United States*, 98 U.S. 145 (1878)), was actually in France at the time of the Convention where the First Amendment was adopted and had only limited contact with Madison during the period. Jefferson and Madison did correspond, but only over Jefferson's concern that there was no Bill of Rights in the Constitution. Robert L. Cord, *Separation of Historical Fact and Current Fiction* 85-86 (1982). Jefferson's view of religious liberty appeared to be more restricted than Madison's and would limit it to beliefs, rather than actions. Judge McConnell indicates that "Jefferson's advocacy of a belief-action distinction placed him at least a century behind the argument for full freedom of religious exercise in America." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1452-53 (1990) (footnotes omitted) ("*Historical Origins*").

licenses for meetings or preaching, let alone preach in the established churches. When they preached at homes and in fields, they were frequently imprisoned. *See generally,* Lewis Peyton Lewis, *Imprisoned Preachers and Religious Liberty in Virginia* (1938) ("*Imprisoned Preachers*"). Preachers in Madison's native Orange County were charged with vagrancy and unlawful assembly and were regularly assaulted and jailed. The persecution extended to several other counties, including Culpeper, Chesterfield and Spotsylvania. *Id.* Writing to an old college friend about the imprisonment of the Baptist preachers, Madison averred that he had "squabbled and scolded, abused and ridiculed so long about it, to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all." William C. Rives, I *History of the Life and Times of James Madison* 44 (1859) ("*Life and Times*").

The imprisonment of these early preachers did not put an end to their preaching. To the contrary, they were permitted to preach and exercise their religion in and from the jails that held them. For example, Elijah Craig, a Baptist preacher in Orange County, was jailed in 1768 "for a considerable time," but engaged in "preaching through the bars to the people who resorted to the prison till he was confined to the inner dungeon where there was no opening save a hole in the door through which he received his food and water." *Imprisoned Preachers, supra,* at 135. Another account describes the treatment of the Rev. John Weatherford, a Baptist preacher from Chatham, Virginia, who was confined in the colonial jail at Chesterfield Courthouse for unauthorized preaching.

> His brethren and admirers flocked on Sunday to the village and thronged the yard of the jail.... [H]e would lift the window and thrust his hands through the bars that he might shake hands with his loyal followers. He would also preach through the window to the assemblage, and often in the ardor of

> delivery would thrust his hands through the bars in earnest gesture. Men of the baser sort were instigated to stand on either side of the window, and armed with knives, would slash his hands in unpitying cruelty until, it was said, his hands would stream with blood as he spoke, and sometimes in his gesticulations, forgetful of his wounds, he would scatter his blood on his hearers or on the ground.

Id. at 342-43. William Webber and Joseph Anthony were also imprisoned in Chesterfield in 1770, where it is said that during their three-month imprisonment, "[t]he space around the jail was the meeting place, and the sill of the jail window was the desk upon which lay their Bible and hymn book, while the iron grating was but slight interruption to their earnest utterances of the truth." *Id.* at 212. In Spotsylvania County, five men were imprisoned for unlawful preaching and held forty-three days, during which they preached through the bars. Patrick Henry assisted with their release and has been described as the "unwavering friend" of dissident preachers. *Id.; see also* Robert Baylor Semple, *History of the Baptists in Virginia* 41 (1894). Henry is also reported to have paid Rev. Weatherford's fine and won his release. *Imprisoned Preachers, supra,* at 346.

In Culpeper County, just north of Madison's Montpelier Plantation, the persecution was even worse. The Rev. James Ireland, after preaching at a residence and being given the choice "not to teach, preach or exhort, for twelve months and a day, or go to jail," chose the latter. *Id.* at 161. When he later preached through the bars of the Culpeper jail, his listeners were interrupted by horses galloping through the crowd. *Id.* at 163. Ireland also described miscreants who "got a table, bench, or something else, stood upon it, and made their water in my face" and who also attempted to blow him up with gunpowder. *Id.* at 163-64. When this did not work, his persecutors crushed pods of Indian pepper, mixed it with

brimstone and burned it near the jail door "so that the whole jail would be filled with the killing smoke, and oblige [Ireland] to go to cracks, and put [his] mouth to them in order to prevent suffocation." *Id.* at 164.

B. Madison's Involvement with Persecution and Religious Liberty

Persecutions such as those described above were well known to Madison. He "took a prominent stand in behalf of the removal of all disabilities, repeatedly appearing in the court of his own county to defend the Baptist nonconformists, was elected from Orange co. [sic] to the Virginia convention in the spring of 1776, and signalized the beginning of his public career by producing the passage of an amendment to the Declaration of Rights as prepared by George Mason, substituting for the term 'toleration' a more emphatic assertion of 'religious liberty.'" Johnson's III *New Universal Cyclopedia* 201 (1876), quoted in *id.* at 130-31.[5] Madison wrote to a friend "[t]hat diabolical, hell-conceived principle of persecution rages among some; and to their eternal infamy, the clergy can furnish their quota of imps for such purposes. There are, at present in the adjacent county not less than five or six well-meaning men in close jail for publishing their religious sentiments, which, in the main, are very orthodox." *Life and Times, supra,* at 43.

Madison believed that "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Everson v. Board of Education,* 330 U.S. 1, 65 (1947) ("*Everson*"), *quoting*

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[5] Madison objected on the ground that the word "toleration" [proposed by Mason] implies an act of legislative grace, which in Locke's understanding it was. Madison proposed, and the Virginia assembly adopted, the broader phrase: "the full and free exercise of [religion]." *Historical Origins, supra,* at 1443.

James Madison, *Memorial and Remonstrance Against Religious Assessments.* Religion thus "must be left to the conviction and conscience of every man." *Id.* at 64. Madison regarded it as an "inalienable right" and a "duty" that is "precedent both in order of time and degree of obligation, to the claims of Civil Society." *Id.* In his *Memorial and Remonstrance* to the Virginia legislature, Madison argued that

> [b]efore any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Id. Thus, according to Madison, a prior claim is made upon all men and women by their religion which Civil Society is bound to acknowledge, notwithstanding the civil status of the individual. Indeed, this view comports with the rights declared in the Declaration of Independence and the subsequent Virginia Declaration of Rights authored by George Mason, with assistance from Madison. "Madison advocated a jurisdictional division between religion and government based on the demands of religion rather than solely on the interests of society." *Historical Origins, supra,* at 1453. This jurisdictional division operated between the national government and the states *vis-à-vis* the Establishment Clause and between the national government and individuals insofar as the individual liberties of the Free Exercise Clause were concerned. Dreisbach, *supra,* n. 3, at 67-70.

The principles that emerge from Madison's view of religious freedom are (1) that all men are endowed with the

inalienable right to religious freedom, (2) that this right has its origins in the Creator and (3) that it precedes Civil Society. As Madison said, "[i]f all men are by nature equally free and independent, all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights." *Everson,* 330 U.S. at 66 (citation omitted). This is little different from the founding principles of independence for this country spoken in its Declaration to King George I.[6] As Judge McConnell has concluded, "An understanding of the historical roots of free exercise exemptions...suggests...a peculiarly American conception of the relation between religion and government—one that emphasizes the integrity and diversity of religious life rather than the secularism of the state." *Historical Origins, supra,* at 1416.

C. Madison's Original Proposal and Subsequent Drafts of the Free Exercise Clause in Congress

Madison's original draft of the Free Exercise Clause submitted to the House of Representatives read as follows: "The civil rights of none shall be abridged on account of religious belief or worship, [n]or shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed." Hamburger, *supra,* n. 3, at 105. After considering his suggested language, the version reported from committee in the House of Representatives read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." Daniel L. Dreisbach, *Real Threat and Mere Shadow* 59 (1987). According to the contemporaneous congressional journal, Madison's understanding was that "Congress shall not establish a

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[6]"We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness...." *The Declaration of Independence* (U.S. 1776).

religion, and enforce the observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* at 60, *quoting* 1 *Annals of Congress* 730 (1789-1791). The House, with minor stylistic changes, finally adopted language proposed by Fisher Ames: "Congress shall make no law establishing Religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.* at 62.

The Senate debates were not recorded, leaving only the several proposals considered by the Senate. *Id.* at 63. The first proposal read: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed." *Id.* After debating amendments and other proposals, the Senate eventually adopted the following language: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion...." *Id.* at 64. This language was sent to a Conference Committee, where the phrase "rights of conscience" in the House version was dropped and the phrase "no law establishing religion" was replaced with "no law respecting an establishment of religion." *Id.* at 64-65.

The Free Exercise Clause as adopted and ratified by the States did not expressly accord protection to secular philosophies divorced from Religion. Judge McConnell observes that the "textual insistence on the special status of 'religion' [was]...rooted in the prevailing understandings, both religious and philosophical, of the difference between religious faith and other forms of human judgment." *Historical Origins, supra*, at 1496. This likewise appears to be the view reflected in the state constitutions and bills of rights adopted during the Colonial Period. *Id.* at 1455-56, 1499. Judge McConnell concludes that:

> The Madisonian perspective points toward pluralism, rather than assimilation, ecumenism, or secularism, as the organizing principle of church-state relations.... So understood, the free exercise clause also makes an important statement about the limited nature of governmental authority.... Even the mighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience. In such a nation, with such a commitment, totalitarian tyranny is a philosophical impossibility.

Id. at 1516.

D. The Special Need for Accommodating Religious Practice in Prisons

In Madison's day, imprisonment did not mean an end to the prisoner's religious duties. Indeed, in the case of the Baptist preachers, it only enhanced their message and the popularity of their cause. In this present day, Baptist preachers no doubt would not be permitted to preach as prisoners from prison grounds. However, despite changes in prisons and greater security on prison grounds, the principles of religious freedom and individual rights that Madison and the other Framers espoused are immutable. The freedom brought by the preaching of the Baptist preachers applies to the social setting of prisons, just as it does in other parts of Civil Society. The very fact is that prisons are insular and extreme environments may require not only a more tailored application of religious freedom, but also more heightened safeguards, because prison

> [a]mplif[ies] the "noise" of ordinary social life by intensifying competition, rivalry, hostility,

> manipulativeness and vindictiveness — as well as friendship, altruism, solidarity and generosity. This is partly why religion becomes unusually important for some prisoners. Religion casts a new clarity on life for some; and for others prison life creates a new need for clarity about religion.

James A. Beckford and Sophie Grant, *Religion in Prison: Equal Rites in a Multi-Faith Society* xi, 142 (1998). In this restrictive and volatile environment, there is the even more subtle danger of arbitrary application of personal predilections by prison guards and officials.

> This is the central evil in prison. It is not homosexuality, nor inadequate salaries, nor the cruelty and physical brutality of some of the guards. *The central evil is the unreviewed administrative discretion granted to the poorly trained personnel who deal directly with prisoners.* The existence of this evil necessarily leads to denial of communication, denial of right to counsel and denial of access to the courts. Prison becomes a closed society in which the cruelest of inhumanities exist unexposed.

Philip J. Hirschkop and Michael A. Millemann, *The Unconstitutionality of Prison Life*, 55 Va. L. Rev. 785, 811-12 (1969) (emphasis added). This long-recognized problem can be particularly difficult in recognition of prisoners' right to free exercise of religion. As Congress found in connection with its enactment of RLUIPA:

> Far more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents' right to practice their

> faith is at the mercy of those running the institution, and their experience is very mixed. It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.

Senator Orin Hatch and Senator Edward F. Kennedy, *Joint Statement on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774, 7775 (July 27, 2000, 106th Congress, 2nd Session) ("Senators Hatch and Kennedy, *Joint Statement on RLUIPA*"). The extensive testimony at hearings before the House of Representatives Judiciary Committee described numerous incidents of the administrative denial of religious observance, including breaches of dietary laws for Jewish and Muslim prisoners, refusal to purchase matzo (the unleavened bread required to be eaten by Jews on Passover), prohibiting Christian communion and even recording confessions made by prisoners to ministers. Marc D. Stern of the American Jewish Congress testified that in one unreported case brought under the Religious Freedom Restoration Act (RFRA), "the State of Pennsylvania took the position that it need not provide kosher food for inmates. It took a federal judge just minutes to decide to the contrary, a not surprising conclusion since the federal system and New York State all manage to provide such food without any great difficulty." *Hearing on The Need for Federal Protection of Religious Freedom and* Boerne v. Flores, *Before the Constitution Subcommittee of the House Comm. on the Judiciary,* March 26, 1998 (Prepared Testimony of Marc D. Stern, American Jewish Congress) (footnote omitted). Stern continued: "[A]nyone who engages in prison related work cannot help but be struck by the fact that what prison officials insist in one facility would bring chaos and a total breakdown of security, works perfectly well in apparently comparable facilities. RFRA works well to test

which predictions of chaos are legitimate and which are nothing more than the usual bureaucratic reluctance to accept outside oversight." *Id.*

In evaluating conflicts under the Religion Clauses of the First Amendment, this Court has routinely acknowledged that accommodation of the religious beliefs of the American people is permitted, and sometimes necessary, to achieve both the broad purposes of the Religion Clauses and the public welfare objectives of the modern administrative state. *See, e.g., McGowan v. Maryland*, 366 U.S. 420 (1961); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Roemer v. Board of Public Works*, 426 U.S. 761 (1976); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) ("Amos"); *Bowen v. Kendrick*, 487 U.S. 589 (1988). Thus, although the Free Exercise Clause may not arguably *require* society to accommodate religious practice under "neutral laws of general applicability," *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court has nevertheless recognized that "a society that believes in the negative protection afforded [by the First Amendment] to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.* at 890. Legislative accommodation of rights of conscience is consistent with earlier pronouncements of this Court that "government may (and sometimes must) accommodate religious practices and...it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-145 (1987); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Boerne v. Flores*, 521 U.S. at 507; *Bowen v. Kendrick*, 487 U.S. at 605-618.[7]

[7] Other public welfare legislation has likewise been upheld against facial Establishment Clause challenge when the purposes for the legislation were found to be aimed at legitimate public welfare objectives. Thus, in *Bowen v. Kendrick, supra*, this Court upheld Federal social legislation permitting religious organizations to administer teen and family life programs. The Equal Access Act, a

III. THE PROVISION OF REMEDIES AND STANDARDS OF REVIEW FOR POTENTIAL INFRINGEMENT ON RELIGIOUS PRACTICE IN PRISONS DOES NOT CONSTITUTE AN ENDORSEMENT OF RELIGION.

The United States Congress passed the Religious Freedom Restoration Act and its progeny, the Religious Land Use and Institutionalized Persons Act, to rectify threats to the free exercise of religion in prisons. As previously mentioned, the enactment of each of these laws followed hearings[8] in which Congress collected evidence of a tide of religious discrimination that was otherwise irremediable under the rational basis criteria of *Employment Div. v. Smith*, 494 U.S. 872 .[9] While the judicial remedies allowed by the *Smith* case are not effective in challenging neutrally applicable regulations that burden religious exercise in prisons, the *Smith* Court nevertheless acknowledged that legislative action was appropriate to accommodate problems of religious exercise. *Id.* at 890. Despite this recognition, the Sixth Circuit has ruled

law granting students equal access to public school facilities for religious, philosophical, political and other speech, was also upheld by this Court against an Establishment Clause challenge, notwithstanding the fact that language in the Act was aimed at benefiting religious and other speech. *Mergens*, 496 U. S. at 248.

[8] The Subcommittee on the Constitution of the House of Representatives Committee on the Judiciary held six hearings on the legislation over two sessions of Congress. Committee on the Judiciary, House Report 106-219, p. 5, 106th Congress, 1st Session, July 1, 1999. The Senate Committee on the judiciary held three hearings. Senators Hatch and Kennedy, *Joint Statement on RLUIPA*.

[9] The *Smith* Court held that the states, and the courts, were not constitutionally required to act to remove burdens from, or to accommodate, religious exercise caused by laws of neutral applicability so long as such laws were reasonably aimed at achieving a legitimate state objective. *Id.* at 884-90.

that the Establishment Clause precludes Congress from taking such action, invoking the tri-partite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon*") to strike down the law.

The basis of the Sixth Circuit's Establishment Clause decision is that RLUIPA "favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation." *Cutter v. Wilkinson*, 349 F.3d 257, 262 (6th Cir. 2003) ("*Cutter*"). Not only is this holding out of step with the admitted "juggernaut" of other courts that have looked at the same issue (*id.*), it is also out of step with this Court's precedents and should thus be reversed.[10]

A. The Secular Purpose of RLUIPA

The Sixth Circuit panel first found that RLUIPA failed the "secular purpose" prong of the tri-partite *Lemon* Test[11] by singling out religious rights for special protection. In doing so, Congress "abandoned neutrality" and acted with "intent of promoting a particular point of view in religious matters." *Cutter*, 349 F.3d at 263, *quoting Amos*, 483 U.S. at 327, 335. But this approach slights the conclusion made by the Court in *Amos* that "it is a permissible legislative purpose to alleviate

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[10] The Seventh Circuit, the Ninth Circuit and most recently the Fourth Circuit, have all upheld RLUIPA against Establishment Clause claims. *See Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) ("*Madison*"); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002). The Sixth Circuit in *Cutter* and the Fourth Circuit in *Madison* applied the three prong test for violations of the Establishment Clause articulated in *Lemon*, 403 U.S. at 602, but came to opposite conclusions. Several Courts of Appeals have also held that the religious accommodation provisions of RFRA (which are identical to Section 3 of RLUIPA) do not violate the Establishment Clause. *See In Re Young*, 141 F.3d at 1522; *Mockaitis v. Harcleroad*, 104 F.3d at 1522; *Sasnett v. Sullivan*, 91 F.3d at 1018; *EEOC v. Catholic Univ. of Am.*, 83 F.3d at 455; *Flores v. City of Boerne*, 73 F.3d at 1352.

[11] *Lemon*, 403 U.S. at 602.

significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. There is no reason that it should be any different for the individual exercise of religious beliefs.

The Sixth Circuit attempts to reconcile this discrepancy by distinguishing the Title VII exemption for religion in the *Amos* case as being "arguably necessary to avoid a violation of the Establishment Clause." *Cutter*, 349 F.3d at 263. RLUIPA, it says, was fundamentally different and unnecessary for the same reason and therefore discloses a governmental preference for religion. This reasoning is fundamentally flawed. It ignores the recognition that government can, and sometimes is obligated to, act in order to protect religious rights without violating the Constitution. *See, e.g., Zorach v. Clauson*, 343 U.S. 306 (1952); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) ("*Walz*"); *Wisconsin v. Yoder*, 406 U.S. at 205; *Amos*, 483 U.S. at 327. Moreover, there is simply no precedent in this Court limiting Congress' enactment of legislation protecting free exercise only for the purpose of avoiding Establishment Clause violations. Indeed, the logical extension of the respondents' reasoning is that the Free Exercise Clause is invalidated by the Establishment Clause unless secular interests are included as well, which departs from the structure and philosophical premises underlying the Religions Clauses. *See* discussion, *supra*, Section I(C).

This Court has long acknowledged, and recently affirmed, that there is and must be "play in the joints" between the Religion Clauses. *Walz*, 397 U.S. at 664, 669; *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307 (2004). The more rigid, and decidedly more hostile, view of the Religion Clauses taken by the Sixth Circuit stands in direct contrast to this Court's precedents. In the *Walz* case (upholding a New York tax exemption for religious institutions), this Court succinctly stated that:

> the general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. *Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.*

Walz, 397 U.S. at 669 (emphasis added). Congress' action in passing RLUIPA clearly falls within this space. It is clear that the government's actions do not have to be *devoid* of religion in order to satisfy the first prong of the *Lemon* test. *Mergens*, 496 U.S. at 226; *Widmar v. Vincent*, 454 U.S. at 263, 272. Moreover, to force disregard for such religious rights, which are affirmatively and specifically protected rights under the First Amendment, is arguably contrary to the Establishment Clause. Peradventure, when government chooses to *accommodate* religious practice, it "follows the best of our traditions" and "respects the religious nature of our people... [T]o hold that [government] may not [do so] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. at 314.

The Sixth Circuit's attempt to distinguish *Amos* on the basis that RLUIPA sweeps more broadly than the more targeted Title VII exemption at issue in *Amos* is also flawed. The court viewed Title VII's limited exemption as being a "particular requirement in prescribed circumstances" and thus a proper exercise of legislative power, but considered RLUIPA's institution of "a standard of review in every case which implicates religious conduct" as constitutionally excessive. *Cutter*, 349 F.3d at 263-64 (quoting Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*). This broader scope, says the panel,

"suggests that [RLUIPA's] actual purpose is not to accommodate religion by removing a particular obstacle to religious exercise, but 'to advance religion in prisons relative to other constitutionally protected conduct.'" *Cutter*, 349 F.3d at 263 (quoting *Kilaab Al Ghashiyah (Khan) v. Department of Corr.*, 250 F. Supp. 2d. 1016 (E.D. Wis. 2003), *overruled by Charles v. Verhagen*, 348 F.3d at 601). The answer to this argument is found in the Fourth Circuit opinion upholding RLUIPA, which correctly observes that although RLUIPA "may in some ways be broader than the specific religious exceptions that the Supreme Court has previously upheld, the central principle – that Congress may legitimately minimize government burdens on religious exercise – remains the same." *Madison*, 355 F.3d at 317.

B. Primary Effect and Entanglement

The Sixth Circuit's perception of Congress' choice to protect prisoner religious rights as a "governmental preference" toward religion feeds into the Sixth Circuit's conclusion that RLUIPA also violates the "effects" prong of the *Lemon* test. According to the Sixth Circuit, the government abandons neutrality when it seeks to "either endors[e] a particular religion or promot[e] religion generally," *Cutter*, 349 F.3d at 262, and the "government should not prefer one religion to another, or religion to irreligion." *Id., quoting Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Because, in their view, RLUIPA gives greater protection to religious rights than to other constitutionally protected rights, it impermissibly advances religion and shows a governmental preference for religion. *Cutter*, 349 F.3d at 264.

For a law to have forbidden "effects" under *Lemon*, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337 (emphasis in original). Here, "Congress has not sponsored religion or become actively involved in religious activity, and RLUIPA in no way is attempting to indoctrinate

prisoners in any particular belief or to advance religion in general in the prisons. Congress has merely lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths." *Madison*, 355 F.3d at 317. By acting to alleviate governmental burdens on the constitutionally protected right of free exercise, Congress is not *itself* advancing religion, but simply creating a remedy *for inmates* who may choose to avail themselves of the legislatively created right to challenge arbitrary restrictions on religious exercise. Simply because those individuals choose to invoke this legal remedy does not mean that the government has impermissibly endorsed or advanced religion or religious practice or exercise. Rather, the Congress has merely provided a means for inmates to seek removal, after judicial review, of substantial and unwarranted burdens on the individual exercise of religion. The Court has previously recognized the importance of individual choice as breaking the connection between government action and religion. *See Locke v. Davey*, 124 S. Ct. at 1311; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding the Cleveland school voucher program despite the fact that parents chose to use the money to send their children to religious schools). Here, not only does RLUIPA not promote religious exercise, the break in connection served by the independent actions of inmates in choosing to exercise the legal remedy to challenge restrictions on religious exercise breaks the connection between RLUIPA and any endorsement of religion or religious exercise. *Zelman v. Simmons-Harris*, 536 U.S. at 639; *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

The Sixth Circuit asserts that it is "well known from the history of constitutional law [that] the change that RLUIPA imposes is revolutionary." *Cutter*, 349 F.3d at 264. But RLUIPA seeks to remove only the "most substantial burdens States impose upon prisoners' religious rights, while giving States' penological interests due consideration. The statute does not promote religious indoctrination, nor does it guarantee

prisoners unfettered religious rights, and not every challenge under RLUIPA will be deemed valid." *Charles v. Verhagen*, 348 F.3d at 611. In fact, it seems that most RLUIPA challenges are denied and prison officials prevail "the overwhelming majority of the time." *Madison*, 355 F.3d at 321 (citing Note, *Developments in the Law – Religious Practice in Prison*, 115 Harv. L. Rev. 1891, 1894 (2002)).[12] RLUIPA does not impose "affirmative duties on states that would require them to facilitate or subsidize the exercise of religion. RLUIPA instead calls for exactly the opposite — forbidding states from imposing impermissible burdens on religious worship so that prisoners may practice their religion free from unlawful interference." *Mayweathers v. Newland*, 314 F.3d at 1068-69. Thus, RLUIPA has not worked the "revolutionary" change that *Cutter* insists and has not resulted in any government advancement of religion.

The idea that Congress impermissibly advances religion when it acts to provide a means of lifting burdens on religious exercise, but not other rights, is simply insupportable as a matter of law. "There is no requirement that legislative protections for fundamental rights march in lockstep,"

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[12] In their Joint Statement in the Congressional Record upon passage of RLUIPA (146 Cong. Rec. S 7774, July 27, 2000), Senators Hatch and Kennedy indicated that "[t]he Department of Justice reports that RFRA 'has not been an unreasonable burden to the Federal prison system,' and that the federal Bureau of Prisons has experienced only 65 RFRA suits in six years, most of which also alleged other theories and would have been filed anyway." *Id., citing* Letter from Robert Raben, Assistant Attorney General, to Senators Hatch and Leahy (July 19, 2000). In addition, the Senators reported that "[o]ther empirical studies also show that religious liberty claims are a very small percentage of all prisoner claims, that RFRA led to only a very slight increase in the number of such claims, and that on average RFRA claims were more meritorious than most prisoner claims." *Id., citing* Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. Davis L. Rev. 573 (1999).

Madison, 355 F.3d at 318, and no requirement that Congress provide remedial legislation for all persons or all rights enumerated in the Bill of Rights. In *Amos*, this Court emphasized that: "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. And as the Fourth Circuit noted, "No provision of the Constitution even suggests that Congress cannot single out fundamental rights for additional protection. To attempt to read a requirement of symmetry of protection for fundamental liberties would...conflict with all binding precedent." *Madison*, 355 F.3d at 319.

The Sixth Circuit placed particular emphasis on the fact that there is "no proof that religious rights are more at risk in prison than other fundamental rights." *Cutter*, 349 F.3d at 265-66 (quoting *Madison*, 240 F. Supp. 2d at 566, 576, (W.D. Va. 2003), *reversed by Madison*, 355 F.3d 310). But in other cases where the Court has upheld religious exceptions, there was no requirement of proof that the religious rights were more threatened more than other rights. *See, e.g., Amos*, 483 U.S. at 327 (upholding exception to Title VII requirements for religious employers); *Walz*, 397 U.S. at 664 (upholding property tax exemptions for houses of worship); *Zorach v. Clauson*, 343 U.S. at 306 (upholding statutes that allow release time for public school students for religious instruction). Moreover, not only has Congress been presented with documented instances of prolonged litigation with prison officials over arbitrarily inhibiting religious exercise, such as recording priest-penitent confessions, denying communion and stripping prisoners of crosses and other religious icons, national leaders of religious outreaches to prisoners have also testified before Congress, documenting other cases of unwarranted infringement on religious exercise by prison administrators. Senators Hatch and Kennedy, *Joint Statement on RLUIPA*.

It is true that many fundamental rights are of necessity burdened in the prison environment—such is the very nature of being a prisoner. However, Congress has made the *legislative* judgment that the suppression of religious liberty is not required in order to advance penological purposes. Though other constitutional rights may be burdened, the "Constitution itself provides religious exercise with special safeguards." *Id.* Providing a remedy to permit the exercise of the principal liberty upon which our nation was founded was deemed to serve the important purposes of rehabilitation, personal motivation and the advancement of moral standards in the prison environment and, therefore, deserving of accommodation within reason. *See, e.g.,* Byron R. Johnson, *et al., Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs,* Justice Quarterly, March 1997 (study showing that prisoners most active in Bible studies were significantly less likely to be rearrested after release). Therefore, Congress' choice in protecting those rights over others is not attributable to governmental favoritism of religion as much as to sound social policy and the advancement of protected constitutional interests.

C. Endorsement of Religion Vis-à-Vis Non-Religion

The Sixth Circuit also worried that since "the rules do not apply with the same force to the religious as to the agnostic or atheist," Congress, it says, has advanced religion by "giving religious prisoners a preferred status in the prison community." *Cutter*, 349 F.3d at 266-67 (internal quotation omitted). But accommodation does not equal preference. In enacting RLUIPA, Congress reflected the Framers' belief that religious belief and "the free exercise thereof" hold a special place in the Bill of Rights and in American society. Simply because some inmates have different needs than others on account of religious beliefs does not mean that the government favors them in accommodating those beliefs, just as it does not follow that the government favors Muslims when it allows

them to possess a prayer mat, as required by their religion, and not a Christian inmate whose religious beliefs do not require the use of such a mat. If the agnostic or atheist has no spiritual needs being burdened, there is nothing to accommodate.

The Sixth Circuit further asserted that besides the appearance of endorsement by the government, RLUIPA also has the effect of "encouraging prisoners to become religious in order to enjoy greater rights...induc[ing] prisoners to adopt or feign religious belief in order to receive the statute's benefits." *Cutter*, 349 F.3d at 266. However, if this reasoning stands, logic dictates that the deeply traditional exception for conscientious objectors be eliminated as well, since it could arguably have the very same effect. The fact that the government will allow exemptions because of religious belief may encourage one to feign religious belief to gain conscientious objector status. This possibility should not be allowed to trump the long-recognized importance and sustained value of freedom of conscience. As Justice Harlan Fiske Stone wrote, "it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." *United States v. Seeger*, 380 U.S. 163, 170 (1965) (*quoting* Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919)). Any concern that the Act creates "incentives for secular prisoners to cloak their secular requests in religious garb and thus may increase the burden on state and local officials in processing RLUIPA claims" is "not a concern under the Establishment Clause...it speak[s] more to the wisdom of the law." *Madison*, 355 F.3d at 319. This Court's place is not to question the wisdom of Congress' legislative judgment, but rather to test that judgment against the Constitution. As this Court's jurisprudence recognizes, "[w]e do not sit as a 'superlegislature' to second guess...policy choices." *Ewing v. California*, 538 U.S. 11, 28 (2003). Where there is no constitutional violation, administrative difficulties should play no role in the Court's decision.

Finally, the Sixth Circuit's opinion calls into question

entire classes of previously approved legislative religious accommodations, including not only the "conscientious objector" standard or exceptions to compulsory military service for clergy and divinity students, but also the "clergy-penitent privilege," various tax exemptions and exemptions from compulsory public schooling and curricula. *Madison*, 355 F.3d at 320. Indeed, the Sixth Circuit's reasoning would "work a profound change in the Supreme Court's Establishment Clause jurisprudence and in the ability of Congress to facilitate the free exercise of religion in this country." *Id.* Given the recognized importance of religious exercise by the Constitution, the Court and the American people, RLUIPA must be upheld as a legitimate legislative accommodation to protect religious practice.

CONCLUSION

James Madison, the architect of the Religion Clauses, was all too aware of the need to protect the rights of those whose religious values seemed unusual or out of the ordinary. He was aware of imprisoned ministers preaching from jailhouse windows and decried their persecution. It was his primary concern, notwithstanding near descendants who subscribed to the religion of the State Church of England, to protect the rights of dissenters and to guarantee inalienable liberties. Likewise, Colonial legislatures enacted exemptions, taking into account individual religious liberties. Congress now follows in that historical tradition with a modern-day accommodation to insular religious minorities by providing a legal remedy for heightened consideration of facts and circumstances of restrictions on religious practices in an extreme and otherwise closed environment, operating with little outside supervision or oversight.

In his concurring opinion in *City of Boerne v. Flores*, Justice Scalia asked the question whether the people, through their elected representatives, or this Court shall control the outcome of concrete cases where general, nondiscriminatory

laws place unreasonable burdens upon religious practice. In response, he declared, "It shall be the people." 521 U.S. at 507, 544. In answering the similar question in the present case, "whether the people, through their elected representatives, may provide, or whether the court shall prohibit, a legal remedy to accommodate religious exercise in prisons," the response should be the same: "It shall be the people."

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No. 03-9877

In The
Supreme Court of the United States

JON B. CUTTER, et al.,

Petitioners,

v.

REGINALD WILKINSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND SEVEN OTHER STATES, AND ONE TERRITORY AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Are the provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc through § 2000cc-5, that require the States, as a condition of receiving federal funds, to implement a particular religious accommodation in state prisons, constitutional?

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INTEREST OF AMICI

The Commonwealth of Virginia and the States of Alaska, Idaho, Iowa, Nebraska, North Dakota, Oklahoma, and West Virginia as well as the Territory of the Virgin Islands ("States") operate state correctional systems which are subject to the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc through 2000cc-5. Like the Respondents, the States believe that RLUIPA is unconstitutional in the context of state prisons.[1] Unlike the Respondents, the States also believe that the United States Court of Appeals for the Sixth Circuit's Establishment Clause analysis is fundamentally flawed. Thus, the States urge this Court to invalidate RLUIPA in the state prison context, but to utilize different grounds than those employed by the Sixth Circuit and to repudiate explicitly the Sixth Circuit's Establishment Clause analysis. In taking these positions, the States seek to vindicate three distinct interests.

1. First, the States have an interest in making religious policy, subject only to the limitations imposed by the Constitution, without interference from the National Government. As originally envisioned by the Framers, the Establishment Clause had both a Libertarian Purpose and a Federalism Purpose. The Libertarian Purpose protected the People from the National Government. The Federalism Purpose ensured that the States would be able to exercise their sovereign authority to make religious policy subject only to the restriction imposed by their own State Constitutions. Although the adoption of the Fourteenth Amendment and resulting incorporation of the Religion Clauses severely limited the sovereign authority of the States to

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[1] RLUIPA has two parts. The first part, which is not at issue in this case, requires that religious organizations be given preferential treatment with respect to local planning and zoning laws. *See* 42 U.S.C. § 2000cc. The States take no position on the constitutionality of this portion of RLUIPA.

make religious policy, these developments did not wholly abolish the States' authority. Nor did they alter the Federalism Purpose of the Establishment Clause. As a result, the Establishment Clause continues to limit the power of the National Government. By enacting RLUIPA, which requires the States to accommodate religion in their state prisons in a manner not required by the Constitution, Congress has violated the Federalism Purpose of the Establishment Clause.

2. Second, the States have an interest in insuring that the National Government remains one of enumerated, hence limited, powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Indeed, "that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). In enacting RLUIPA, Congress has sought to use the Article I Spending Clause, U.S. Const. art. I, § 8, cl. 1, and Commerce Clause, U.S. Const. art. I, § 8, cl. 3, powers to circumvent this Court's holding in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). Because Congress cannot use the Fourteenth Amendment enforcement power, U.S. Const. amend XIV, § 5, to circumvent *Smith*, *see City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997), it ought not be able to use the Article I powers to circumvent *Smith*. Moreover, even if Congress were not attempting to circumvent a constitutional decision of this Court, Congress' Article I Commerce and Spending Clause powers do not allow interference with the States' sovereign authority to define the terms and conditions of punishment for their criminals, subject only to the dictates of the Constitution.

3. Third, the States have an interest in being able to lift burdens imposed by the States on the free exercise of religion without also being required to lift similar burdens

on the exercise of other non-religious rights.[2] Indeed, this Court has recognized that the States may do so without violating the Establishment Clause. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) ("[W]e in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause.") (emphasis in original); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause. It is well established, too, that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.") (citations omitted). Yet, the Sixth Circuit invalidated RLUIPA "because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation." *Cutter v. Wilkinson*, 349 F.3d 257, 262 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 308 (2004). Accepting the Sixth Circuit's rationale would "work a profound change in [this] Court's Establishment Clause jurisprudence and in the ability of Congress [and the States] to facilitate the free exercise of religion in this country." *Madison v. Riter*, 355

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[2] In this respect, the interest of the States is remarkably similar to the interests articulated by New York and Washington. *See Brief of New York & Washington as Amici Curiae*. However, while the States agree with New York and Washington about the importance of government being able to lift burdens on the exercise of religious rights, the States disagree with New York and Washington on the issue of the constitutionality of RLUIPA. New York and Washington urge this Court to uphold RLUIPA. The States ask this Court to find that RLUIPA is unconstitutional as it applies to state prisons.

F.3d 310, 320 (4th Cir. 2003) (*Madison II*), *petition for cert. filed sub. nom. Bass v. Madison* (April 6, 2004) (No. 03-1404).[3] Thus, the States urge this Court to reject the Sixth Circuit's rationale.

SUMMARY OF ARGUMENT

The States contend that RLUIPA is unconstitutional as it applies to state prisons, but that the reasoning of the Sixth Circuit is fundamentally flawed. The argument in support of this contention is relatively straightforward.

1. RLUIPA violates the Federalism Purpose of the Establishment Clause. The Federalism Purpose of the Establishment Clause precludes the National Government from interfering with the States' sovereign authority to make religious policy subject only to the limitations imposed by the Constitution. Within the "play in the joints" between what the Establishment Clause prohibits and the Free Exercise requires, the States have broad discretion to make religious policy as they see fit. RLUIPA interferes with this discretion by imposing a particular prison religious accommodation policy. Thus, RLUIPA, as applied to state prisons, violates the Federalism Purpose of the Establishment Clause.

2. By enacting RLUIPA, Congress exceeded its constitutional authority. This is so for three reasons.

a. First, Congress may not use its Article I powers to circumvent a constitutional holding of this Court. RLUIPA represents Congress' latest attempt to circumvent this

[3] In *Madison II*, the Fourth Circuit explicitly rejected the reasoning utilized by the Sixth Circuit in *Cutter* and by the district court in *Madison v. Riter*, 240 F. Supp. 2d 566, 577 (W.D. Va. 2003) (*Madison I*). In concluding that RLUIPA was unconstitutional, the Sixth Circuit relied heavily on *Madison I*. *See Cutter*, 349 F.3d at 262.

Court's constitutional holding in *Smith*. If Congress cannot circumvent *Smith* using the Fourteenth Amendment enforcement power, *Boerne*, 521 U.S. at 532-36, then Congress cannot circumvent *Smith* using its ordinary Article I powers.

b. Second, by enacting RLUIPA, Congress has exceeded its authority under the Commerce Clause. Quite simply, Congress may not use the commerce power to regulate activities that have little or no impact on interstate commerce. Moreover, Congress may not regulate the States when the States act as sovereigns.

c. Third, by enacting RLUIPA, Congress has exceeded its authority under the Spending Clause. Congress may not use the Spending Clause to undermine the States' sovereign authority. Moreover, even if Congress generally may use the Spending Clause to undermine the States' sovereign authority, RLUIPA is unconstitutional because the requirement to adopt a prison religious accommodation policy is unrelated to any purpose for which federal funds are appropriated. Furthermore, even if the prison religious accommodation policy is related to the purpose for which federal funds are appropriated, RLUIPA is unconstitutionally coercive. Congress may not force the States to choose between forfeiting *all* federal funds and adopting a particular prison religious accommodation policy.

3. The Sixth Circuit's interpretation of the Establishment Clause must be rejected. The Sixth Circuit held that government may not lift the burdens on religious rights unless it also lifts the burdens on non-religious rights. This rationale is flawed for three reasons. First, it ignores this Court's precedents. Second, it ignores the Constitution's text. Third, it casts serious doubts on the validity of many laws and policies.

ARGUMENT

I. RLUIPA VIOLATES THE FEDERALISM PURPOSE OF THE ESTABLISHMENT CLAUSE.

A. The Federalism Purpose of the Establishment Clause Prohibits the National Government from Interfering with the States' Sovereign Authority to Make Religious Policy.

The Establishment Clause has two distinct purposes. First, it has a Libertarian Purpose, which limits the power of the National Government and the States with regard to the People. The Libertarian Purpose of the Establishment Clause mandates "a freedom from laws instituting, supporting, or otherwise establishing religion." Phillip Hamburger, *Separation of Church and State* 2 (2003). Second, and more significant for the present case, the Establishment Clause has a Federalism Purpose that limits the power of the National Government with regard to the States.[4] The Federalism Purpose of the Establishment

[4] Of course, this means that the Establishment Clause applies against the National Government in ways for which there is no comparable application against the States. However, such a difference in application is mandated by the historical purposes of the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring) ("[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. 'States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion] – on a neutral basis – than the Federal Government.' Thus, while the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other . . . ."); *Beauharnais v. Illinois*, 343 U.S. 250, 294 (1952) (Jackson, J., dissenting) ("[T]he inappropriateness of a single standard for restricting State and Nation

(Continued on following page)

Clause mandates that the National Government may not interfere with the States' ability to make religious policy subject only to the limitations imposed by the Constitution. *See Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330 (2004) (Thomas, J., concurring) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with [the States' religious policy choices]."). *See also* Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 Mich. L. Rev. 2347, 2357 (1997) ("Congress has no power to dictate a position on religion . . . for states. It has no power to dictate church-state relations at all – where "state" refers to the governments of the several states. This is the core meaning of the Establishment Clause.").

Of course, the Federalism Purpose of the Establishment Clause assumes that the States have the sovereign authority to make religious policy and that the National Government may not interfere with the States' exercise of that authority. Both of these assumptions require some elaboration.

First, the States have the same sovereign authority to make religious policy. The Constitution "split the atom of sovereignty" by "establishing two orders of government, each with its own direct relationship, its own privity, its

is indicated by the disparity between their functions and duties in relation to those freedoms."); *Roth v. United States*, 354 U.S. 476, 503-04 (1957) (Harlan, J., dissenting) ("The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal.").

own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).[5] By dividing sovereignty between the National Government and the States, the Constitution insured that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, at 291 (James Madison) (Clinton Rossiter, ed., 1961, 1999 prtg.).[6] This division of sovereignty between the States and the National Government "is a defining feature of our Nation's constitutional blueprint," *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002), and "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). Thus, although the States surrendered many of their sovereign powers to the new Federal Government, "the States retain substantial

[5] Justice Kennedy's idea of dividing power between dual sovereigns is not new. As early as 1768, John Dickinson suggested that sovereignty should be divided between the British Parliament and the Colonial Legislatures. *See* 1 Alfred H. Kelly, Winfred A. Harbison, & Herman Belz, *The American Constitution: Its Origins and Development* 46-49 (7th ed. 1991).

[6] *See also The Federalist No. 28*, at 149 (Alexander Hamilton) (Clinton Rossiter, ed., 1961, 1999 prtg.) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."); *The Federalist No. 39*, at 213 (James Madison) (Clinton Rossiter, ed., 1961, 1999 prtg.) ("[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.") (emphasis original); *The Federalist No. 81* at 455 (Alexander Hamilton) (Clinton Rossiter, ed., 1961, 1999 prtg.) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*") (emphasis original).

sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).[7]

Among the sovereign powers retained by the States is the authority to make religious policy. Originally, this authority was quite broad. Prior to the adoption of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, the Establishment Clause, like other provisions of the Bill of Rights, limited only the National Government. *See Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). Thus, the States were free to do whatever they wished with respect to religion, subject only to the commands of their own State Constitutions. *See Locke v. Davey*, 540 U.S. 712, 723 (2004) (describing the history of state constitutional restrictions on the establishment of religion). Now that the Fourteenth Amendment has made both the Establishment and Free Exercise Clauses applicable to the States, *see Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause), the States are restricted substantially in their authority to make religious policy. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972) (Free

[7] The principle that the Constitution divides power between *dual sovereigns*, the States and the Federal Government, is reflected throughout the Constitution's text, particularly in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones. *See Printz v. United States*, 521 U.S. 898, 919 (1997). Indeed, this division of sovereignty between the States and the Federal Government is preserved and reinforced by the Constitution's structure. *See Alden v. Maine*, 527 U.S. 706, 714-15 (1999). These structural limitations, which are above and beyond the limitations imposed by the text of the Bill of Rights or other constitutional provisions, restrict the power of the Federal Government so as to preserve the sovereignty of the States, and vice versa. *See generally* J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. Cal. L. Rev. 523 (2001).

Exercise Clause allows parents to refuse to send children to school beyond the age of thirteen); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (Establishment Clause prohibits practice of daily reading from the Bible in the public schools, even where students are allowed to absent themselves upon parental request). However, because there is "play in the joints" between what the Establishment Clause prohibits and the Free Exercise Clause requires, *Locke,* 540 U.S. at 718-19, the States retain substantial sovereign authority to make religious policy.[8]

Second, when the States exercise their sovereign authority to make religious policy, the National Government may not interfere.[9] *See Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting) (noting that the Establishment Clause was adopted, in part, "to protect state establishments of religion from federal interference"). *See also* Joseph Story, *Commentaries on the Constitution of the United States*, § 1873 (1833) (The Establishment Clause was intended "to exclude from the national government *all power* to act upon the subject [of religion].") (emphasis added); *Id.* ("[T]he whole power over the subject of religion

[8] Several examples demonstrate the point. A state university professor may excuse a Jewish student from class for Yom Kippur while refusing to excuse the student who wishes to attend a political protest. A police department may allow a female officer, who is Jehovah's Witness, to wear a skirt while forcing other female officers to wear pants. A public school cafeteria may offer Muslim students an alternative to pork while refusing to offer alternative meals to those students who simply dislike pork. In each instance, the government is not constitutionally required to accommodate the religious exercise, *see Smith*, 494 U.S. at 879, but is not constitutionally prohibited from doing so.

[9] Although the Federalism Purpose of the Establishment Clause confirms this proposition, it would be equally true even if the Establishment Clause did not exist. Quite simply, the National Government may not interfere with the States' exercise of their sovereign authority.

is left *exclusively* to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.") (emphasis added). Moreover, this limitation on the powers of the National Government was recognized widely at the time of the Framing. *See* James Madison, *General Defense of the Constitution* (June 12, 1788), reprinted in 11 *Papers of James Madison* 129, 130 (Robert A. Ruland, et al., eds., 1977) ("There is not a shadow of right in the general government to intermeddle with religion. Its least interference with [religious policy of the States] would be a most flagrant usurpation."); James Iredell, *Debate in North Carolina Ratifying Convention* (June 30, 1788) in 5 *The Founders' Constitution* 90 (Phillip B. Kurland & Ralph Lerner, eds., 1987) (The National Government "certainly [has] no authority to interfere in the establishment of religion whatsoever. . . . "). Indeed, as one of America's leading constitutional historians observed:

> [A] widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion. This by itself does not mean that any person or state understood an establishment of religion to mean government aid to any or all religions or churches. It meant rather that religion as a subject of legislation was reserved exclusively to the states.

Leonard W. Levy, *The Establishment Clause* 74 (1986). Similarly, Professor Schrager has explained:

> [T]he Religion Clause emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment.

Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv. L. Rev. 1810, 1823 (2004). *See also* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 32-42 (1998).

The principle that the National Government may not interfere with the States' sovereign authority to make religious policy is demonstrated easily. Most obviously, prior to the adoption of the Fourteenth Amendment, the States had the sovereign authority, subject only to their respective State Constitutions, to establish or disestablish a church. Had Congress, in the exercise of its Article I powers, attempted to force the States to establish or disestablish a church, Congress would have acted unconstitutionally. In other words, Congress could not have passed a statute requiring the States to choose between receiving federal funds and establishing or disestablishing a church. Similarly, after the adoption of the Fourteenth Amendment, the States have the sovereign authority to choose to fund indirectly religious activity. Although the Establishment Clause does not prohibit the indirect funding of religion, *see Zelman*, 536 U.S. at 652 (2002) (holding that school choice vouchers may be used at private religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) (holding that a disabled student at private religious school could receive special education services); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (holding that State could provide funds for the education of blind student studying for the ministry), the Free Exercise Clause does not require that the States indirectly fund religious education or activity. *See Locke*, 540 U.S. at 720-25. If Congress, in the exercise of its Article I powers, attempts to force the States to fund or not to fund indirectly religious activity, then Congress acts unconstitutionally. In other words, Congress could not pass a statute requiring the States to choose between receiving federal funds and

allowing religious schools to participate in a school choice program.[10]

B. By Enacting RLUIPA, Congress Has Interfered with the States' Sovereign Authority to Make Religious Policy.

RLUIPA interferes with the States' sovereign authority to enact religious policy within the zone between what the Establishment Clause prohibits and what the Free Exercise Clause requires. Specifically, RLUIPA mandates that whenever the States' policies of general applicability impose a "substantial burden" on religion, the State must accommodate the religious exercise unless it can demonstrate that its interests are compelling and that its interests cannot be achieved through less intrusive means. 42 U.S.C. § 2000cc-1(a). To illustrate, suppose that a prison has a policy that inmates may not wear hats or other head coverings because prisoners might use them to hide weapons or other contraband. Although the policy is one of general applicability, a Sikh prisoner says that the policy violates his Free Exercise rights because his religious

[10] In some extraordinary circumstances, Congress may be able to dictate how the States exercise their discretion with respect to religion. Section 5 of the Fourteenth Amendment empowers Congress to enforce the Establishment Clause and the Free Exercise Clause when it can be demonstrated that the States have engaged in unconstitutional conduct and when the resulting legislation is proportionate to the constitutional violations. *Boerne*, 521 U.S. at 532-36. In determining whether legislation is proportionate in contexts other than the Religion Clauses, the Supreme Court has upheld prophylactic measures that require or prohibit more than mere adherence to parameters imposed directly by the Constitution. *See, e.g., Tennessee v. Lane*, 124 S. Ct. 1978, 1985 (2004). Assuming that Section 5 allows Congress to act in a similar fashion in the area of religion, and assuming that the other prerequisites of Section 5 are met, then a Congressional mandate for States to exercise their discretion in a particular manner would not violate the Establishment Clause.

beliefs require him to wear a hat or a turban. Under *Smith* and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987),[11] because the policy is one of general applicability, the federal Free Exercise Clause does not compel the State to provide accommodation.[12] *See Hines v. South Carolina Dep't of Corr.*, 148 F.3d 353, 357-58 (4th Cir. 1998). Yet, RLUIPA supplants the constitutional standard of *Smith* and *O'Lone* and requires that the State accommodate the request.

Although this requirement may seem relatively benign, RLUIPA has the effect of undermining the States' efforts to combat prison gangs. Indeed, white supremacists and other gangs have routinely invoked RLUIPA to thwart the States' anti-gang practices. *See, e.g., Johnson v. Martin*, 223 F. Supp. 2d 820, 822-23 (W.D. Mich. 2002); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 833, 834 (S.D. Ohio 2002); *Marria v. Broaddus*, 200 F. Supp. 2d 280, 284 (S.D.N.Y. 2001). Moreover, RLUIPA's "least restrictive means" test provides uncertain standards, greatly complicating prison management. Before *O'Lone*, courts scrutinized prison regulations under tests varying from rational basis to strict scrutiny and, not surprisingly, reached conflicting results as to the propriety of indistinguishable actions. This Court ultimately rejected the "least restrictive means" test because, "every administrative judgment [was] subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner v. Safley*, 482 U.S. 78, 89

[11] Under *O'Lone*, "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349.

[12] There is some question as to whether the constitutional Free Exercise claims of prisoners are governed by the *Smith* standard or by the *O'Lone* standard. *See Hines*, 148 F.3d at 357. This Court need not resolve that issue in this case. RLUPIA requires far more than either *Smith* or *O'Lone*.

(1987). That uncertainty greatly interfered with the States' ability to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.*[13]

By enacting RLUIPA, Congress has exceeded its authority because those provisions interfere with the States' discretion to fill "the play in the joints" as they deem appropriate. While RLUIPA *favors* the accommodation of religion, it interferes with States' sovereignty just as much as if Congress had *prohibited* such accommodation. If the Congress that enacted RLUIPA may constitutionally exercise the power asserted, it is difficult to see how the Constitution would protect the States against some future Congress' action based upon using federal power for the opposite result. *See* Rubenfeld, *supra* at 2357 ("Congress may not try to dictate church-state relations even to vindicate religious toleration or free exercise. . . . To the extent that state can constitutionally enact laws [concerning religious policy], Congress can make no law instructing them not to do so. That would be a quintessential violation of the [Establishment Clause]. . . . ").

II. BY ENACTING RLUIPA, CONGRESS HAS EXCEEDED ITS CONSTITUTIONAL AUTHORITY

A. Congress May Not Use Its Article I Powers to Circumvent a Constitutional Holding of This Court.

Congress enacted RLUIPA as a means of circumventing this Court's decision in *Smith*. *See Madison*, 355 F.3d

[13] Of course, before this Court invalidated the Religious Freedom Restoration Act, *see Boerne*, 521 U.S. at 532-36, inmates routinely manipulated the "strict scrutiny" standard. *See, e.g., Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir. 1996); *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996).

at 314-15.[14] In *Smith*, this Court effectively overruled *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963), and held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879. *See also United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring). In other words, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1 through 2000bb-4, which effectively sought to overrule the holding in *Smith* and restore the *Sherbert* standard. Congress sought to justify this attempt to circumvent a constitutional holding of this Court by relying on its powers to enforce the Fourteenth Amendment. However, in *Boerne*, this Court rejected that argument and invalidated RFRA as it applies to the States and local governments. *See Boerne*, 521 U.S. at 532-36. In doing so, this Court emphasized that the meaning of the Constitution is determined by this Court, not by Congress or the Executive Branch or the States. *See Id.* at 524.

In response to *Boerne*, Congress passed RLUIPA, which effectively sought to overrule *Smith* and restore the *Sherbert* standard in the limited contexts of local land use decisions and institutionalized persons. "Congress sought to avoid *Boerne's* constitutional barrier by relying on its

[14] Moreover, to the extent that the free exercise claims of prisoners are governed by *O'Lone* rather than *Smith*, RLUIPA represents an attempt to circumvent this Court's constitutional holding in *O'Lone*.

Spending and Commerce Clause powers, rather than on its remedial powers under section 5 of the Fourteenth Amendment as it had in RFRA." *Madison*, 355 F.3d at 315. In other words, Congress believed that it could use its Article I powers to circumvent a constitutional holding of this Court.

Congress' belief is mistaken. If a constitutional holding cannot be circumvented by the use of the extraordinary Fourteenth Amendment enforcement power, *Boerne*, 521 U.S. at 532-36, then it certainly cannot be circumvented by the general Article I powers. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 683-84 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [*v. Florida*, 517 U.S. 44 (1996)]."). This Court should invalidate RLUIPA for the simple reason that it is an attempt by Congress to use its Article I powers to circumvent a constitutional holding of this Court.

B. By Enacting RLUIPA, Congress Has Exceeded Its Authority Under the Commerce Clause.

In enacting RLUIPA, Congress relied upon the Commerce Clause. Indeed, the statute explicitly states that RLUIPA is applicable whenever the burden on religion or its removal affects "commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2).

However, RLUIPA is not a valid exercise of the Article I Commerce Clause Power. This is so for two reasons. First, a State's operation of its prisons has little or no impact on interstate commerce. Second, even if a State's operation of its prisons has a substantial impact on interstate commerce,

Congress may not regulate the States when the States act as sovereigns.

1. Congress May Not Use the Commerce Power to Regulate Activities That Have Little or No Impact on Interstate Commerce.

This Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995). First, Congress may "regulate the use of the channels of interstate commerce." *Id.* at 558. Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* Third, Congress may regulate "intrastate activities having a substantial relation to interstate commerce." *Id.* at 558-59. This Court has stated that this last category includes only those activities that are economic in nature. *Id.* Thus, if RLUIPA is a valid exercise of the Commerce Clause, RLUIPA must fit into one of these three categories.

RLUIPA does not fit into either of the first two categories. A state prison's policies regarding religious accommodation within the prison do not involve the use of a channel of interstate commerce. Nor do a state prison's policies concerning religious accommodation involve an instrumentality of interstate commerce. Goods and services do not legally flow between the States using the prisons. Rather, a state prison's policies concerning religious accommodation are simply an *intrastate* activity. Thus, for RLUIPA to be a valid exercise of the Commerce Clause power, RLUIPA must fit into the third category – the regulation of intrastate activities that substantially affect interstate commerce.

The test for determining whether an intrastate activity substantially affects interstate commerce varies depending on whether the regulated activity is economic in nature. If the intrastate activity is economic in nature, the impact of all similar activity nationwide is considered. Conversely, if the intrastate activity is not economic in nature, its impact on interstate commerce must be evaluated on an individualized, case-by-case basis. *See United States v. Morrison*, 529 U.S. 598, 617-19 (2000). Thus, the question becomes whether a state prison's religious accommodation policies are economic in nature.

A state prison's religious accommodation policies are clearly non-economic in nature. Such policies are a reflection of security and safety concerns. Commercial considerations are not involved. Rather, the focus is on preventing disruption and maintaining a stable prison environment. It "has nothing to do with 'commerce' or any sort of economic enterprise." *Lopez*, 514 U.S. at 561. It is not "an essential," or indeed any, "part of a larger regulation of economic activity." *Id.* A state prison's religious accommodation policy is not "in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613 (citation omitted).

2. Congress May Not Regulate the States When States Act as Sovereigns.

Moreover, even if the regulation of the States' prison religious accommodation policies did substantially affect interstate commerce, RLUIPA still would not be a valid exercise of the Commerce Clause. Congress may not regulate the States when the States act as sovereigns.

To explain, while Congress may regulate the States when the States engage in general commercial activities, *Reno v. Condon*, 528 U.S. 141, 150-51 (2000), Congress may not regulate the States when the States act in their sovereign capacities. *See Printz*, 521 U.S. at 924 ("Even

where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . The Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."); *New York*, 505 U.S. at 166 ("The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

To illustrate, Congress may require those States that sell oranges to comply with the same U.S. Department of Agriculture regulations applicable to private orange sellers. However, Congress may not require the State to enact certain policies toward sellers of oranges. The former is a regulation of interstate commerce; the latter is a regulation of the States as sovereigns. In enacting RLUIPA, Congress clearly is regulating the States in their sovereign capacity. This is not a statute generally regulating commerce that is applicable to private parties and States alike if the States choose to engage in a particular economic activity. Rather, this is a statute that regulates religious accommodation in prisons and, by its very terms, is applicable only to the States and the States' agents. Accordingly, RLUIPA is not a valid exercise of the Commerce Clause power.

C. By Enacting RLUIPA, Congress Has Exceeded Its Authority Under the Spending Clause.

In enacting RLUIPA, Congress also relied on the Spending Clause. Indeed, the statute explicitly states that

it is applicable to any "program or activity that receives Federal financial assistance," 42 U.S.C. § 2000cc-1(b)(1).

However, RLUIPA is not a valid exercise of the Article I Spending Clause Power. This is true for three independent reasons. First, Congress may not use the Spending Clause to undermine the States' sovereign authority. Second, even if Congress generally may use the Spending Clause to undermine the States' sovereign authority, RLUIPA is unconstitutional because the requirement to adopt a prison religious accommodation policy is unrelated to any purpose for which federal funds are appropriated. Third, even if the prison religious accommodation policy is related to the purpose for which federal funds are appropriated, RLUIPA is unconstitutionally coercive. Congress cannot force the States to choose between forfeiting *all* federal funds and adopting a particular prison religious accommodation policy.

1. The Spending Clause May Not Be Used To Undermine The States' Sovereignty.

One component of the States' sovereignty is the authority to define the terms and conditions of punishment for its criminals, subject only to the dictates of the Constitution. *See Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with the state laws, regulations, and procedures, than the administration of its prisons."). Undoubtedly, the States will vary in how they exercise their sovereign authority. Some States may operate their prisons as rehabilitative centers for self-improvement while other States may view their prisons as a means of inflicting the harshest punishment permitted by the Constitution. Congress, foreign nationals, citizens of other States, and even a State's own citizens may disagree with the policy choices of various States. However, as long as

the State complies with the restrictions of the Constitution, the State has the sovereign authority to pursue the policies and practices it deems necessary and appropriate with respect to the operation of its prisons.

RLUIPA eliminates the States' sovereign authority over their prisons by requiring that, as a condition of receiving any federal funds for corrections, a State must adopt a particular prison religious accommodation policy. Essentially, the States must choose between maintaining their sovereign authority to operate their prisons as they wish, subject only to the Constitution, and receiving federal funds for correctional purposes.

Forcing the States to make such a choice is unconstitutional. The National government cannot purchase the States' sovereignty. If government "may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may be thus manipulated out of existence." *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926). Quite simply, if Congress can use the Spending Clause power to eliminate the States' sovereign authority over prisons, then it can use the Spending Clause power to replace the States' sovereign authority over education, criminal law, domestic relations, transportation, taxation, and a myriad of other subjects.

In order to protect the States' sovereignty, the "mechanism for exercising power under the Spending Clause, however, must have limits."[15] *Litman v. George*

[15] In its efforts to preserve the States' sovereignty, this Court has limited Congress' Commerce Clause power, *Morrison*, 529 U.S. at 615-16; *Lopez*, 514 U.S. at 563-64, as well as its power to enforce the Fourteenth Amendment, *Morrison*, 529 U.S. at 619-27; *Boerne*, 521 U.S. at 519-24. However, this Court has not articulated similar limits on the Spending Clause power. Consequently, Congress now has "a seemingly easy end run around any restrictions the Constitution might be found

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Mason Univ., 186 F.3d 544, 552 (4th Cir. 1999). "If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., joined by Brennan, J., dissenting). Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," *Lopez*, 514 U.S. at 578 (Kennedy, J., joined by O'Connor, J., concurring), the Spending Clause cannot be used to "render academic the Constitution's . . . limits of federal authority." *New York*, 505 U.S. at 167.

2. The Conditions Imposed by RLUIPA Are Unrelated to Any Purpose for Which Federal Funds Are Provided to State Correctional Systems.

Even if Congress generally may use its Spending Clause power to undermine the States' sovereign authority, RLUIPA is still unconstitutional. The requirement that the States adopt a particular prison religious accommodation policy is unrelated to any purpose for which federal funds are offered to the States.

to impose on its ability to regulate the states. Congress need merely attach its otherwise unconstitutional regulations to any one of the large sums of federal money that it regularly offers the states." Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 Harv. J.L. & Pub. Pol'y 95, 101 (1998). Indeed, "the states will be at the mercy of Congress so long as Congress is free to make conditional offers of funds to the states that, if accepted, regulate the states in ways that Congress could not directly mandate." Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 Annals 104, 105 (2001).

In *Dole,* this Court declared, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207. *See also Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion). The reason for this requirement is clear – conditions on the receipt of federal funds always must "bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167 (citations omitted).

RLUIPA fails the relatedness test. Quite simply, there is no apparent federal interest at stake in the operations of state prisons. First, unlike many federal programs, Congress is not directing how a specific appropriation is spent. In other words, RLUIPA is unlike Congress appropriating money for prison construction and then dictating the size of each individual cell. Rather, in enacting RLUIPA, Congress is simply adding these conditions as an afterthought to other appropriations for other purposes. Second, unlike the highways at issue in *Dole*, state prisons are not instrumentalities of commerce. It is one thing for Congress to attach conditions to the receipt of federal funds in order to make an instrumentality of commerce safer. It is quite another for Congress to attach conditions to the receipt of federal funds as a means of substituting its judgment for that of state officials. Third, unlike Title VI, 42 U.S.C. § 2000d, Congress is not requiring the States to merely comply with the Constitution. *See Grutter v. Bollinger,* 539 U.S. 306, 343 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (noting that Title VI is coextensive with the Equal Protection Clause). Rather, RLUIPA requires accommodation of religious belief that is simply not required by either *Smith* or *O'Lone.*

3. RLUIPA Is Unconstitutionally Coercive.

Even if Congress generally may use the Spending Clause to undermine the States' sovereignty and even if RLUIPA is related to the purpose for which federal funds are provided, RLUIPA is still unconstitutional. The choice imposed by RLUIPA is unconstitutionally coercive.

Although this Court has recognized that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take," *College Sav. Bank*, 527 U.S. at 686, this Court has also recognized that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211. *See also Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). "If the Congressional action amounts to coercion rather than encouragement, then that action is not a proper exercise of the spending powers but is instead a violation of the Tenth Amendment." *West Virginia v. Dep't of Health & Human Servs.*, 289 F.3d 281, 286-87 (4th Cir. 2002). *See also College Sav. Bank*, 527 U.S. at 687 ("In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity."). Thus, "federal statutes that threaten the loss of an entire block of federal funds upon a relatively minor failing by a state are constitutionally suspect." *West Virginia*, 289 F.3d at 291.[16]

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[16] Of course, several Circuits have suggested that the coercion principle is substantively meaningless. *See Kansas v. United States,* 214 F.3d 1196, 1202 (10th Cir. 2000) ("[T]he coercion theory is unclear, suspect, and has little precedent to support its application."); *California*

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RLUIPA requires the States to either adopt a particular prison religious accommodation policy or lose *all* federal funds for *all* correctional operations. To explain, RLUIPA applies to any "program or activity" that receives federal funds. 42 U.S.C. § 2000cc-1(b)(1). The term "program or activity" is defined as "all of the operations of any entity" described in 42 U.S.C. § 2000d-4(a)(1) or (2). 42 U.S.C. § 2000cc-5(6). That provision covers a variety of entities including "a department, agency, special purpose district, or other instrumentality of a State or a local government." 42 U.S.C. § 2000d-4(a)(1). In other words, if "any part" of a State's correctional system receives "federal financial assistance" for any purpose, then all operations of the correctional system are covered. *See* 42 U.S.C. § 2000cc-1; 42 U.S.C. § 2000d-4. That federal funds do not affect the Department of Corrections' religious accommodation programs is of no consequence.

In *Dole*, this Court's coercion analysis focused not on the amount of money at issue or the percentage of the State's budget at issue, but on the *percentage of federal money at issue*. This Court held that a statute that required forfeiture of five percent of federal funds was not coercive. *Dole*, 483 U.S. at 211. In doing so, this Court necessarily implied that some number greater than five percent of federal funds would be coercive. While one can

v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) ("[T]o the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record."); *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) ("The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely with a hard choice. . . . We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue.").

only speculate as to what that number is, surely a statute that requires the loss of one hundred percent of federal funds meets that test. *See Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (Luttig, J., joined by Wilkinson, C.J., Russell, Widener, Wilkins, & Williams, JJ., announcing the judgment of the court) (There is unconstitutional coercion when the National Government "withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States. In such a circumstance, the argument as to coercion is much more than rhetoric; it is an argument of fact."). Indeed, if one hundred percent withdrawal does not exact coercion, then the coercion principle is essentially empty.[17]

III. THE SIXTH CIRCUIT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE SHOULD BE REJECTED.

In striking down RLUIPA, the Sixth Circuit set out a unique interpretation of the Establishment Clause. Under this theory, "[w]hen Congress acts to lift the limitations on one right while ignoring all others, it abandons neutrality towards these rights, placing its power behind one system of belief. When the one system of belief protected is religious belief, Congress has violated the basic requirement of neutrality embodied in the Establishment Clause." *Cutter*, 349 F.3d at 266 (quoting *Madison I*, 240 F. Supp. 2d at 577). In other words, the accommodation of religious rights cannot be treated any better (or any worse) than

[17] Moreover, unlike the program at issue in *Dole*, which was limited to funds for a *single* purpose, RLUIPA threatens the loss of *all* funds for *all* purposes.

the accommodation of non-religious rights. Thus, Congress may not "reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography." *Madison II*, 355 F.3d at 319. In the Sixth Circuit's view, additional protection for religious rights is permitted only if there is "evidence that religious rights are at greater risk of deprivation . . . than other fundamental rights." *Cutter*, 349 F.3d at 265.

Although the Sixth Circuit reached the correct result in that it declared RLUIPA unconstitutional, its rationale must be rejected. This is so for three reasons.

First, the Sixth Circuit's rationale contradicts this Court's decisions upholding "a broad range of statutory religious accommodations against Establishment Clause challenges." *Brown v. Gilmore,* 258 F.3d 265, 275 (4th Cir.), *cert. denied*, 534 U.S. 996 (2001). Indeed, this Court has upheld statutes permitting schools to release students for religious worship, *Zorach v. Clauson,* 343 U.S. 306, 315 (1952), property tax exemptions for church property, *Walz v. Tax Comm'n,* 397 U.S. 664, 680 (1970), and exemptions for religious organizations from anti-discrimination laws, *Amos*, 483 U.S. at 335. Thus, "[t]here is no requirement that legislative protections for fundamental rights march in lockstep. The mere fact that RLUIPA seeks to lift government burdens on a prisoner's religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights." *Madison II*, 355 F.3d at 318.

Second, the Sixth Circuit's analysis ignores the Constitution's text, which confers special protections for religious rights. The fact that religious rights are explicitly mentioned and that there is no textual command for symmetry with non-religious rights suggests that religious rights may be given favorable treatment if the government desires. As the Fourth Circuit observed:

> Free exercise and other First Amendment rights may be equally burdened by prison regulations, but the Constitution itself provides religious exercise with special safeguards. And no provision of the Constitution even suggests that Congress cannot single out fundamental rights for additional protection. To attempt to read a requirement of symmetry of protection for fundamental liberties would not only conflict with all binding precedent, but it would also place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-guessing at every turn.

Madison II, 355 F.3d at 319.

Third, and most importantly, the Sixth Circuit's reasoning would have profound and widespread effects. Indeed, acceptance of the Sixth Circuit's rationale:

> would throw into question a wide variety of religious accommodation laws. It could upset exemptions from compulsory military service for ordained ministers and divinity students under federal law, since these exemptions are not paired with parallel secular allowances or provisions to protect other fundamental rights threatened by compulsory military service. It would similarly imperil Virginia's and other states' recognition of a "clergy-penitent privilege," which exempts from discovery an individual's statements to clergy when "seeking spiritual counsel and advice." Other specific religious accommodation statutes, ranging from tax exemptions to exemptions from compulsory public school attendance, would also be threatened.

Madison II, 355 F.3d at 320 (citations omitted). Furthermore, the Sixth Circuit's rationale "would create a test that Congress could rarely, if ever, meet in attempting to lift regulatory burdens on religious entities or individuals." *Id.*

CONCLUSION

RLUIPA, as applied to state prisons, is unconstitutional. The judgment of the United States Court of Appeals for the Sixth Circuit should be AFFIRMED, but for reasons other than those articulated by the lower court.

Respectfully submitted,

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